The protection of African transgender women's rights to dignity, life and health through a teleological reading of the Maputo Protocol

by

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Declaration

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Summary

International human rights law asserts that all individuals are born free and equal in dignity and rights. The principle of universality, read together with the rights to equality and non-discrimination, embody this pronouncement and reaffirm that all human rights are bestowed unto all humans because they are human. This is accepted and reflected in most regional and domestic legal systems worldwide. Nonetheless, on the African continent, this pronouncement does not guarantee protection of the human rights of African individuals with non-normative gender identities. African transgender women in particular are an invisible minority, often misidentified as homosexual men. As a result, they frequently become victims of violence, discrimination and stigma. Because of their non-normativity and the denial of their gender identities and womanhood, these women are deprived of legal recognition and the protection of their rights. Moreover, this discrimination and the subsequent violations against them are justified by states as part of their cultural beliefs and/or traditions. Accordingly, the argument of the 'relativism' of human rights is presented by many states as defence for the prioritisation of 'religious and cultural' rights over gender identity rights. However, this is a failure of states to recognise that individuals with non-normative gender identities are human beings, entitled to their fundamental human rights.

Treaties are a key mechanism of international law. Accordingly, treaty interpretation is an important tool to understand and implement international law. Whilst there are three approaches to interpretation typically recognised, the teleological approach to treaty interpretation, also known as the purposive approach, is argued to be the most effective in the interaction with human rights treaties. The Maputo Protocol is a regional African treaty which codifies the rights of African women. In the Maputo Protocol 'women' are defined by their female gender. Therefore, this thesis assesses whether African transgender women are recognised and protected through a teleological interpretation of the Maputo Protocol, in consideration of the definition for women set out in the Protocol. This assessment is done through an application of post-modern intersectional feminist legal theory, queer legal theory, the principle of universality as well as the rights to equality, non-discrimination and dignity.

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Opsomming

Die internasionale menseregte regsraamwerk bevestig dat alle individue gelyk en vry in waardigheid en regte gebore word. Die beginsel van universaliteit, wat saam met die regte tot gelykheid en nie-diskriminasie gelees word, beliggaam hierdie uitspraak en bevestig dat alle menseregte aan alle mense toegeken word omdat hulle menslik is. Dit word in die meeste plaaslike- en binnelandse regstelsels wêreldwyd aanvaar en weerspieël. Nietemin, op die vasteland van Afrika, is dit vir Afrika-individue met nie-normatiewe seksuele oriëntasies en gender-identiteite nie ‘n waarborg nie. As ‘n onsigbare minderheid is dit veral transgender-vroue in Afrika wat dikwels as homoseksuele mans verkeerd geïdentifiseer en verstaan word. Hierdie miskenning het die gevolg dat hulle gereeld slagoffers van geweld, diskriminasie en stigma is. Vanweë hul nie-normatiewe identiteit en die ontkenning van hul gender-identiteite en vroulikheid, word hierdie vroue van formele regserkenning en die beskerming van hul fundamentele regte ontneem. Boonop word hierdie diskriminasie en die daaropvolgende menseregte skendings deur state geregverdig as deel van hul kulturele oortuigings en/of tradisies. Gevolglik word die argument van die 'relativisme' van menseregte deur baie state voorgehou as regverdiging vir die prioritisering van 'godsdienstige en kulturele' regte bo gender-identiteit regte. Dit is egter 'n mislukking van state om te erken dat individue met nie-normatiewe gender-identiteite mense is wat die reg op hul fundamentele menseregte het nie.

Die werking van internasionale reg geskied deur die kodifisering van verdrae. Daarom is verdragsinterpretasie 'n belangrike hulpmiddel om die internasionale reg te verstaan en te implementeer. Alhoewel daar drie benaderings tot interpretasie wat tipies erken word, is, word die teleologiese benadering tot verdragsinterpretasie, ook bekend as die doelgerigte benadering, as die doeltreffendste in die wisselwerking met menseregte verdrae aangevoer. Die Maputo-protokol is 'n plaaslike verdrag in Afrika wat die regte van vroue kodifiseer. 'Vroue', soos in die verdrag omskryf, word gedefinieer deur hul vroulike geslag. Daarom evalueer hierdie tesis of transgender-vroue in Afrika erken en beskerm word deur 'n teleologiese interpretasie van die Maputo-protokol, inaggenome van die definisie van vroue wat in die protokol uiteengesit word. Hierdie evaluering word deur middel van 'n post-moderne *intersectional* feministiese regsteorie, queer regsteorie, die beginsel van universaliteit, sowel as die regte op gelykheid, nie-diskriminasie en waardigheid gedoen.

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Table of abbreviations

AIDS	Acquired immunodeficiency syndrome
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
DSM	Diagnostic and Statistical Manual of Mental Disorders
HIV	Human immunodeficiency virus
HRC	Human Rights Committee
ICD	International Classification of Diseases and Related Health Problems
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
LGBTQI	Lesbian, gay, bisexual, transgender, queer and intersex
NGO	Non-governmental organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
S.H.E	Social, Health and Empowerment Feminist Collective of Transgender Women in Africa
SMUG	Sexual Minorities Uganda
SOGI	Sexual orientation and gender identity
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

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CHAPTER 1

INTRODUCTION

1 1 Problem statement and motivation

Within much of the African continent the prevailing culture of religious and traditional conservatism poses a major threat to the human rights of individuals with non-normative gender identities. As will be argued and substantiated throughout this thesis, African transgender women in particular are stigmatised and marginalised due to discrimination as a result of their non-normative gender identities, as well as the denial of their womanhood. Violence against African transgender women is, as van der Merwe suggests:

> "[P]ervasive, particularly against trans women of colour. Violence against trans women is institutionalised – from the family to the medical establishment to incarceration. A trans woman in Zimbabwe was arrested for using the female bathroom. A trans woman from Uganda was attacked and severely beaten for being seen as the "face of homosexuality" in Uganda. A trans woman in Cape Town was killed for being herself. Sadly, these women's experiences will not make it into country reports submitted to United Nations agencies because they are not seen as 'women's issues'".[1]

This thesis departs from the principle of universality, which is inherently coupled with the rights to equality and non-discrimination. Together, they act as the foundation of international human rights law substantiating that all human rights are indivisible, interdependent and interrelated.[2] Accordingly, the persecution and discrimination of African transgender women, which implicates their ability to have their fundamental human rights realised and protected, requires analysis.

Treaties are crucial to the operation of international human rights law as they codify rights and obligations in order to hold states accountable. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ("Maputo Protocol" or "Protocol")[3] is a regional human rights treaty developed in accordance with article 66 of the African Charter on Human and People's Rights ("African Charter").[4] It was created to codify the human rights of African women and to ensure that these are "promoted, realised and protected".[5] It is important to acknowledge that

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1 L van der Merwe "Trans women and feminism" the struggle is real" (02-08-2016) *openDemocracy* <https://www.opendemocracy.net/en/5050/trans-women-and-feminism-struggle-is-real/> (accessed 24-07-2019).
2 R Wallace & O Martin-Ortega *International Law* 7 ed (2013) 244.
3 (adopted 11 July 2003, entered into force 25 November 2005).
4 (adopted 27 June 1981, entered into force 21 October 1986).
5 Preamble of the Maputo Protocol.

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both the principle of universality as well as the rights to equality and non-discrimination are enshrined in the Maputo Protocol. Furthermore, it is noteworthy, as will be further explored in this research, that the Maputo Protocol defines women as persons of female gender and not of female sex.[6]

This thesis was motivated by the fact that currently, there is no instrument within international law nor under the African human rights system which specifically recognises and protects transgender women and their rights. In the majority of States Parties to the Maputo Protocol, the existence of transgender women is often overlooked because transgender issues do not fit in within the dominant religious and/or heteronormative cultures. Even in consideration of 'queer activism' in Africa, attention to transgender rights is negligible in comparison to the focus on the rights of gay and lesbian Africans.[7] Moreover, the suffering of transgender women often occurs unnoticed whilst they continue to operate as invisible in legal and social realms.

Within international human rights law it is a well-established notion that "all human beings are born free and equal in dignity and rights".[8] Furthermore, it is well-accepted that all individuals are entitled to their human rights without distinction of any kind and that these rights, as mentioned, are universal, indivisible, interdependent and interrelated.[9] Notwithstanding this conceptualisation, African transgender women are frequently excluded from legal recognition and protection because of their non-normative gender identities and are subsequently denied their womanhood.

1 2 Research questions and hypotheses

This thesis is based on the primary research question whether African transgender women can be recognised and protected through a teleological interpretation of the Maputo Protocol. As the main hypothesis, this thesis proposes that the heteronormative lens through which the Maputo Protocol is currently, and generally, read and applied, endorses an interpretation which excludes transgender women based on discrimination against their non-normative gender identities. This is argued to be contrary to the object and purpose of international human rights law in general and the Maputo Protocol specifically. Furthermore, it is theorised that a teleological

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6 Article 1(k) of the Maputo Protocol.
7 J Oloka-Onyango "Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya" (2015) 15 *AHRLJ* 49.
8 Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) art 1.
9 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 para 5.

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interpretation of the Maputo Protocol and its definition of 'women' in article 1(k) (using the wider concept of gender, rather than sex, to define women) supports the notion that transgender women can be subsumed under this definition to protect their fundamental human rights.

Considering the primary research question, each chapter of this thesis presents and assesses related, secondary, research questions:

1. What is the function of gender, legally speaking, when ascertaining who is regarded as a woman?
2. Can gender recognition be considered as an aspect of the right to dignity?
3. What encompasses full and effective protection of the right to life of African transgender women?
4. What is incorporated in the highest attainable standard of health of African transgender women?

In view of these questions, it is assumed that articles 3, 4 and 14 can be purposefully interpreted to ensure adequate protection of African transgender women's rights as requisite within international human rights law. Moreover, it is supposed that State Parties have a clear obligation to uphold these women's inalienable human rights because of their ratification of the Maputo Protocol, and that in failing to recognise and protect them and their respective human rights, the State Parties are in violation of international human rights law, in general, and the Maputo Protocol specifically.

1 3 Research aim and objectives

In consideration of the research questions and hypotheses set out, the primary research aim of this thesis is to assess whether African transgender women can be recognised and protected through a teleological interpretation of the Maputo Protocol, considering the definition provided for 'women' in article 1(k) and the object and purpose of the Maputo Protocol.

The related four research objectives are as follows:

1. To distinguish applicable theories and methodologies to contextualise the legal position of African transgender women under regional human rights law.
2. To provide a teleological interpretation of the right to dignity contained in article 3 of the Maputo Protocol to assess gender recognition as an inherent aspect of

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the right and the inclusion of African transgender women as protected legal subjects.

3. To offer a teleological interpretation of the rights to life, integrity and security of the person contained in article 4 of the Maputo Protocol to assess subsequent State Party obligations.
4. To postulate a teleological interpretation of the right to health contained in article 14 of the Maputo Protocol to assess subsequent State Party obligations.

1 4 Theory and methodology

Chapter 2 provides a full assessment of the theory and methodology used to achieve the main research aims described above. It presents the two theoretical perspectives which inform this research: post-modern intersectional feminist legal theory and queer legal theory. These theories are crucial for the assessment of the terms 'women' and 'gender' as used in the Maputo Protocol. Chapter 2 further presents the principle of universality in conjuncture with the rights to equality and non-discrimination as they are foundational to international human rights law and guide the subsequent interpretation process.

Methodologically, this research centres on interpreting the Maputo Protocol through a teleological approach to treaty interpretation. Article 31 of the Vienna Convention on the Law of Treaties ("VCLT")[10] sets out the general rules of treaty interpretation. The teleological approach is found in article 31(1) and requires interpretation to be carried out in consideration of a treaty's "object and purpose". Although chapter 2 briefly illustrates all three approaches presented in article 31(1), the teleological approach is the only method applied throughout the research. Furthermore, as reiterated above, 'women' are defined in article 1(k) of the Maputo Protocol as "persons of female *gender*" [emphasis added]. Accordingly, this thesis implements a teleological interpretation of the Maputo Protocol to assess the relationship between African transgender women and the Maputo Protocol, in consideration of its underlying object and purpose and the definition of 'women'. Moreover, other relevant articles in the Protocol are read together throughout the analysis to ensure that the Protocol is interpreted in consideration of all the relevant, interlinked, rights contained within it.[11]

[10] (adopted 23 May 1969, entered into force 27 January 1980).
[11] Notwithstanding the focus on interpreting articles 1(k), 3, 4 and 14 – articles 1(f), 1(g), 1(j), 2 and 5 are subsequently used to inform the interpretation process.

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1 5 Scope and limitations

This thesis is limited to the study of African transgender women i.e. individuals on the African continent who identify as women but were born male.[12] Moreover, only State Parties to the Maputo Protocol are considered in the evaluation which follows, as the findings of this research will only be relevant to the states that have ratified the Protocol.[13] Whilst this research acknowledges the state reporting procedure as a key mechanism to ensure compliance with the Protocol, it does not provide an in-depth analysis of this procedure nor does it present an assessment of the domestication of the Maputo Protocol. The focus is rather on the results of a teleological interpretation of the treaty.

Because this thesis is a desktop study, no field work was included and the discussion and analysis are based solely on secondary sources. Under 4 4 1 the lack of relevant data which accounts for human rights violations of African transgender women is highlighted. This is noteworthy as it reinforces the hypothesis that African transgender women are an invisible and vulnerable minority on the continent.

As mentioned under 1 1, the Maputo Protocol is a supplement to the African Charter. Both instruments operate within the African regional human rights system under the auspices of the African Union.[14] The African Commission on Human and Peoples' Rights ("African Commission")[15] and the African Court on Human and People's Rights ("African Court")[16] are the main human rights bodies under this system. The African Court and African Commission complement and reinforce each other's functions.[17] Accordingly, as it is within the mandate of both the African

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[12] There is a full discussion of transgender women under 2 2. Moreover - there is not a focus on transgender men, gender fluid individuals and/or intersex individuals even though it is acknowledged that they all also have non-normative gender identities.

[13] Currently there are 41 State Parties to the Maputo Protocol; see African Union "List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa" *African Union* (28-06-2019) <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 15-02-2019).

[14] The African Union is the successor to the Organisation for African Unity. It was established in accordance with article 2 of the Constitutive Act of the African Union and has been in operation since 2002.

[15] The African Commission was established in accordance with article 30 of the African Charter and has been in operation since 1987.

[16] The African Court was established in accordance with article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights ("Court Protocol") and has been in operation since 2006.

[17] As set out in the preamble of the Court Protocol: "the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights to complement and reinforce the functions of the African Commission on Human and Peoples' Rights".

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Commission and African Court to interpret and apply the African Charter and the Maputo Protocol, pronouncements on the African Charter are relevant to the interpretation and application of the Maputo Protocol and are therefore considered in this thesis.[18]

Key international instruments including *the Universal Declaration of Human Rights* ("UDHR"),[19] *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"),[20] *International Covenant on Civil and Political Rights* ("ICCPR")[21] and *Convention on the Elimination of all Forms of Discrimination against Women* ("CEDAW")[22] are also taken into account as the majority of State Parties to the Maputo Protocol are also State Parties to these instruments. Furthermore, due to an overlap of the rights set out in these instruments and the Maputo Protocol, their respective application and interpretation informs the ensuing interpretation. This includes a consideration of the *General Comments* and General Recommendations of the respective treaty bodies including the Human Rights Committee ("HRC"), Committee on Social, Economic and Cultural Rights ("CESCR"), as well as the CEDAW Committee. In this regard, the preamble of the Maputo Protocol importantly confirms the relevance of:

> "[R]elated Resolutions, Declarations, Recommendations, Decisions, Conventions and other Regional and Sub-Regional Instruments aimed at eliminating all forms of discrimination and at promoting equality between men and women".

Because this thesis focuses on the interaction between international human rights law and the African human rights system specifically, it does not engage with the jurisprudence of the Inter-American nor the European human rights systems. It is acknowledged that these systems, and the findings of their respective adjudicative bodies, provide relevant insights regarding the protection of transgender women in light of their respective human rights instruments and contexts.[23] However,

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[18] The other key instrument in the African human rights system is the African Charter on the Rights and Welfare of the Child. This charter has its own respective committee (African Committee of Experts on the Rights and Welfare of the Child) which oversees its implementation. This charter and the work of this committee are excluded from this research because the focus is on adult transgender women and not girls.

[19] (adopted 10 December 1948) UNGA Res 217 A (III).

[20] (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[21] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[22] (adopted 18 December 1976, entered into force 3 September 1981) 1249 UNTS 13.

[23] The European system's adjudicative body is the European Court of Human Rights which was established through the European Convention on Human Rights. The Inter-American system is more similar to the African system and has both the Inter-American Court of Human Rights as well as the

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considering the limited scope of this thesis and the specific research aim, a focused consideration of the specific challenges presented within the African human rights system was preferable.

In terms of the Maputo Protocol, three articles serve as the focus of this analysis namely: article 3 ("the right to dignity"), article 4 ("the right to life, integrity and security of the person") and article 14 ("health and reproductive rights"). These articles were chosen because, as argued throughout, they contain fundamental rights with specific importance to African transgender women which, if violated, affect the realisation of all their human rights. This is not to indicate that the other rights in the Maputo Protocol are not important or less important.

The analysis of article 4 in chapter 4 focuses on the interpretation of articles 4(1), 4(2)(c) and 4(2)(d). These articles focus on "identify[ing] the causes and consequences of violence against women" as well as "eradicate[ing] elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women". They were chosen because harmful traditional and/or cultural beliefs, practices and/or stereotypes, together with violence, continuously threaten African transgender women's' lives. Therefore, these articles are argued to be particularly relevant in mitigating specific violations against African transgender women.

In chapter 5, articles 14(2)(a), 14(1)(d) and 14(1)(e) are the focus of the discussion. Notwithstanding that article 14 is entitled "Health and Reproductive Rights", chapter 5 does not present an analysis of the related reproductive rights. This is as a result of the limited scope of this research where such complex subject matter would not be adequately dealt with. Thereafter, although articles 14(1)(d) and 14(1)(e) both refer to self-protection and information with regard to sexually transmitted infections ("STIs") as well as to HIV/AIDS, the discussion presented focuses exclusively on HIV/AIDS infections.[24]

Inter-American Commission on Human Rights; both established through the American Convention on Human Rights.

[24] The human immunodeficiency syndrome ("HIV") is a virus that attacks and weakens an individual's immune system whereas the acquired immune deficiency syndrome ("AIDS") is a series of symptoms and illnesses that develop if HIV is not properly treated. Whilst HIV is treatable and patients can live a long life with it, AIDS is not and it is known that once an individual has AIDS their life-span is expected to drastically shorten. HIV/AIDS is a sexually transmitted infection and is transferred through bodily fluids such as blood, pre-ejaculate, vaginal fluids and semen.

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1 6 Chapter outline

As mentioned under 1 4, chapter 2 sets out the relevant theories and methodology used throughout this research. Under 2 2, key terms such as 'gender', 'sex, 'women', 'gender identity', 'transgender', 'cisgender', 'queer' and 'non-normative' are defined and discussed. Additionally, the important acronyms 'SOGI' and 'LGBTQI' are explained and compared.

Post-modern intersectional feminist legal theory is introduced under 2 3. The discussion begins with an outline of feminism and is followed by an analysis of the integration of post-modernism and intersectionality into feminist legal theory. There is also a specific discussion on if, and how, transgender women fit within feminism as well as a consideration of the operation of African feminism. Queer legal theory is discussed under 2 4, focusing on the interaction between transgender women and the law as well as intersectionality through quare theory. The position of queer legal theory in Africa is illustrated as a key tool for the protection of the human rights of African transgender women.

Under 2 5, the principle of universality is reaffirmed as the key principle of international human rights law. The rights to equality and non-discrimination, which are linked to the principle of universality and confirm its application, are outlined to reflect their relevance for ensuring the protection of transgender women. Thereafter, the inverse of the principle of universality, relativism, is discussed. Lastly, as set out under 1 4, the teleological approach to treaty interpretation is explored. Under 2 6, this approach, as well as the objective and subjective approaches, are compared and discussed to evaluate their value to this research.

Chapter 3 illustrates the significance of dignity as contained in international human rights law in general as well as in article 3 of the Maputo Protocol specifically. The assessment begins under 3 2 with an illustration of dignity as presented in the UDHR, ICCPR, ICESCR as well as CEDAW. Under 3 2 2, the argument that the right to gender recognition is an inherent aspect of the right to dignity is presented alongside the acknowledgement that gender recognition is only denied to transgender individuals. This acknowledgement is further discussed in chapter 5. Under 3 2 3, the right to dignity in article 3 of the Maputo Protocol is discussed.

Under 3 3, the object and purpose of the Maputo Protocol is assessed to inform the teleological interpretation. The conflation of the terms 'gender' and 'sex' in the Protocol is discussed as well as what the right to non-discrimination entails and whether gender

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identity is a prohibited ground. Finally, under 3 4 the position of transgender women in the African human rights system is presented. The African Commission's Resolution 275 is analysed as a point of reference for the evolving views of the African Commission. This is followed by an illustration of violations against African transgender women's right to dignity.

Chapter 4 begins, under 4 2, with an evaluation of the generic rights to life, integrity and security within international human rights law. 4 2 1 presents an analysis of the right to life under international human rights law. 4 2 2 discusses the rights to integrity and security under international human rights law as intertwined and interdependent with the right to life. Under 4 3 the specific rights, as contained in article 4 of the Maputo Protocol, are evaluated.

4 4 presents an illustration of violations of the rights to life, integrity and security of African transgender women. 4 4 1 begins with a discussion regarding the lack of available data pertaining to violations against African transgender women which make it difficult to analyse these violations. 4 4 2 presents some of the principle justifications used to defend violations of the rights to life, integrity and security of African transgender women. These include cultural and traditional beliefs and/or practices. Finally, under 4 4 3, illustrations of these violations of the rights to life, integrity and security are set out to show the extent to which African transgender women's lives are threatened.

Chapter 5 is the last substantive chapter and begins, under 5 2 1, with setting out the content of the right to health within international human rights law. Thereafter under 5 2 2, an assessment of whether, and to what extent, gender affirming hormones and procedures are included within this right is presented. Under 5 3 the relevant rights contained in article 14 of the Maputo Protocol are analysed. 5 3 1 presents a discussion of article 14(2)(a), highlighting the issue of access to healthcare and assessing the entitlements of transgender women. Whilst 5 3 2 focuses on the prevention of the spread of HIV, 5 3 3 analyses African transgender women's access to information and services as well as the right to be informed of their HIV status.

Under 5 4 1, the discrimination African transgender women experience within the broader sphere of healthcare and how this affects their ability to realise their right to health is explored. Thereafter, under 5 4 2, a discussion about the pathologisation of African transgender women is presented. This includes an assessment of the difficulties they face in accessing health care services and how this negatively affects

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their ability to resolve their more specific health concerns. The last substantial concern of this chapter, as set out under 5 4 3, is the consideration that African transgender women are a high-risk population for the contraction of HIV, which is a further contributing factor to the overall poor realisation of their right to health.

Chapter 6 summarises the findings of this research and presents recommendations based on these findings.

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CHAPTER 2

THE THEORY AND METHODOLOGY UNDERLINING AFRICAN TRANSGENDER WOMEN

2 1 Introduction

As set out under 1 3, the primary aim of this research is to assess whether African transgender women are recognised and protected under the definition of women in article 1(k) of the Maputo Protocol. This assessment aims to challenge the predisposition of State Parties to read and apply the Maputo Protocol through a heteronormative lens, which endorses an exclusive application of the Maputo Protocol to cisgender women. This is argued to be contrary to the object and purpose of the Protocol itself. In order to understand how African transgender women navigate the gender binary and the 'woman' question, this chapter presents theories and methods relevant to the terms 'gender' and 'women', as stipulated in the Maputo Protocol.

2 2 Constructions of 'women' and 'gender'

As a point of departure, transgender women are individuals who experience themselves as female but whose assigned sex is male at birth.[25] Accordingly, transgender individuals are individuals whose gender identity and biological sex differ. Individuals whose gender identity and biological sex correlate are therefore described as cisgender.[26] Gender is a "historically and culturally bound"[27] social construction, which has often been dominated by western conceptions. Oyèrónke illustrates the dominance of the 'West' in the commonly accepted terminology of 'women' and 'gender'[28] as follows:

> "[In order to] analyse how and why gender is constructed (…) the role and impact of the West are of utmost importance, not only because most African societies came under European rule by the end of the nineteenth century but also because of the continued dominance of the West in the production of knowledge".[29]

This argument is further discussed under 2 3 2 but is relevant to acknowledge when considering what has been influential in the conception of 'gender' within the

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[25] S Prager *Queer, There and Everywhere* (2017) 225.
[26] Prager *Queer, There* 218.
[27] O Oyèrónke *The Invention of Women: Making an African Sense of Western Gender Discourses* (1997) 32.
[28] As this research is written in English, it is noted that there is an implicit English bias on the terms.
[29] Oyèrónke *The Invention of Women* x.

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international legal community and informs why and how certain individuals get to be unequivocally recognised and protected as 'women'.

However, to provide a holistic understanding of the globally accepted perception of 'gender', it is firstly necessary to define 'sex' and 'gender' and distinguish the two. The term 'sex' refers to the biological categorisation of an individual as male, female or intersex.[30] It distinguishes individuals by accounting for the presence of chromosomes, sex hormones, internal reproductive structures and external genitalia.[31] Comparatively, 'gender' refers to the cultural and social construction within which an individual comprehends their identity, which is usually accompanied by the experience of feeling male or female. Thus, the experience of 'gender' is noted as the "mental representation of the self" to identify either as masculine or feminine.[32] Ball argues that:

> "Identities are not predetermined categories that exist independently of the social forces that constitute them. Individuals do not "discover" their identities so much as adopt them as mechanisms and strategies for making sense of the social world around them".[33]

Stryker explains that after birth, an individual is assigned a sex and a corresponding gender. Whether or not they form an association with that gender is part of constructing their respective gender identity; she describes this as a "complex process of socialization".[34] Consequently, an individual's gender is not determined by their biological sex, but rather relates to their gender identity.[35] Gender identity, as defined in the Yogyakarta Principles,[36] makes reference to:

> "[A] person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms".[37]

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30 'Intersex' refers to variances in sexual development, where bodies are not typically male nor typically female but have a combination of both male and female chromosomes, hormones and sexual characteristics.

31 K Govind "Basic Issues of Transgender" in C Subramanian & M Sugirtha (eds) *Transgender Wellbeing an Emerging Issue* (2015) 295.

32 CA MacKinnon "Are Women Human? And Other International Dialogues" in S Wiessner (ed) *General Theory of International Law* (2017) 514.

33 CA Ball "A New Stage for the LGBT Movement Protecting Gender and Sexual Multiplicities" in CA Ball (ed) *After Marriage Equality The Future of LGBT Rights* (2016) 164.

34 S Stryker *Transgender History The Roots of Today's Revolution* 2 ed (2018) 14.

35 Prager *Queer, There* 219, see also P Currah "The Transgender Rights Imaginary" in M Fineman, J Jackson & A Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) 255.

36 The Yogyakarta Principles are non-binding but persuasive international guidelines for the implementation of human rights law with regard to LGBTQI persons.

37 "Yogyakarta Principles" (2007) 1 <http://www.yogyakartaprinciples.org/principles_en.htm> (accessed 04-05-2018).

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Accordingly, because sex and gender are not the same, their conflation impacts how societies commonly understand 'gender', gender expression as well as gender roles. This can negatively affect the perception and treatment of transgender individuals.[38]

The construction of both terms has to be evaluated as part of society which is strongly influenced by the concept of heteronormativity. Based on the assumption that heterosexual identity and behaviour is the implicit normal in society, heteronormativity prioritises social standards in which all individuals are assumed to be heterosexual, cisgender and compliant within the binary conceptualisation of gender and sex, conflating the terms.[39] Such suppositions result in stereotypical expectations of what a 'real' man or a 'real' woman is. Heteronormativity affects non-conforming individuals throughout society, often resulting in their victimisation as a consequence of negative reactions to their non-conforming gender identity.[40] Queer legal theory is crucial for dismantling this and is fundamental in challenging heteronormativity, as further discussed under 2 4.

In order to conceptualise whether transgender women are 'women'; understanding the term is essential. The term 'women' generally refers to the social classification of female individuals. The use of biological sex to entrench this category substantiates the 19th century western notion of biological determinism: the belief that biological features are reasonable justifications for the hierarchical organisation of society.[41] This notion however, has been widely criticised within post-modern intersectional feminist legal theory which is further discussed under 2 3. The concept of biological determinism is intertwined with the principle of gender essentialism: the idea that there are common underlying attributes and experiences which are shared by all women and which bind them together.[42] Those who subscribe to the ideas of gender essentialism emphasise that these shared attributes and experiences are prioritised over any other grounds within the conceptualisation of identity; including race, ethnicity, class, religion, language, disability, sexual orientation and/or gender identity. As defined by Gelman, essentialism can be summarised as:

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38 M Chamallas *Introduction to Feminist Legal Theory* 3 ed (2013) 217.
39 DT Vollmer *Queer Families: An analysis of non-heteronormative family rights under the African human rights system* LLD dissertation, Stellenbosch University (2017) 40.
40 S Kara *Gender is not an illness: How pathologizing trans people violations international human rights law* (2017) 7 13.
41 D Gonzalez-Salzberg "The accepted transsexual and the absent transgender: A queer reading of the regulation of sex/gender by the European Court of Human Rights" (2014) 29 *American University International Law Review* 807.
42 Chamallas *Introduction to Feminist Legal Theory* 93.

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> "The view that certain categories have an underlying reality or true nature that one cannot observe directly, but that gives an object [or individual] its identity, and is responsible for other similarities that category members share".[43]

Appiah argues that essentialism infers generics about individuals based on certain groups they may fall into and assumes their group membership as a fundamental aspect of their identity, even if it is not important for the construction of their own identity.[44] Similarly, gender essentialism declares certain aspects associated with being either male or female as indisputable, disregarding that these traits are often prejudicial and rooted in stereotypical gender norms. Feminists often criticise gender essentialism for creating a false sense of universalisation, which undermines the individual nature of discrimination experienced by different women. This includes the tendency to overlook the experiences of transgender women.[45]

In order to construct an alternative perception of women, it is useful to engage with the enquiry put forward by De Beauvoir: "What is a woman? *"Tota mulier in utero:* she is a womb."[46] This statement epitomises how, for many, a woman is only deemed to be a woman if she can bear children. From this perspective, certain biological elements are deemed essential in order to be identified as a woman which endorses the notion of biological determinism as discussed earlier. Butler criticises the emphasis on this biological ability as heteronormative because it requires women to function and subsist within a "heterosexual matrix"; assuming that all women are straight, cisgender and have a desire to become mothers.[47] Furthermore, this assumption overlooks the reality that many cisgender women who have the ability to bear children may choose not to do so. The ability to bear children as a fundamental criterion to be regarded as a woman is therefore argued to be outdated and exclusionary against transgender women.[48]

'Transgender' is an umbrella term which describes individuals whose gender identities differ from their biological sex.[49] Stryker argues that the term has only come into widespread use in the last few decades and that global consensus of its meaning is still "under construction". However, she uses it to describe individuals who have moved away from their gender assigned at birth, transcending culturally constructed

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43 S Gelman quoted in KA Appiah *The Lies That Bind* (2018) 26.
44 KA Appiah *The Lies that Bind (2018)* 27.
45 Chamallas *Introduction to Feminist Legal Theory* 93.
46 S De Beauvoir *The Second Sex* (1989, c1952) 3.
47 J Butler *Gender Trouble* (1999) 45.
48 Vollmer *Queer Families* 54.
49 Govind "Basic Issues of Transgender" in *Transgender Wellbeing* 294.

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boundaries to be able to define their own gender.[50] Except for a brief discussion under 5 2 2 regarding gender affirming surgery, in this research 'transgender' is used to describe individuals regardless of whether they have, are yet to have, or never plan to have, gender affirming surgery.[51]

Although the term 'transgender' is a recent descriptive concept; individuals with non-normative gender identities have been present throughout history.[52] Feinberg states that transgender as a category "only emerged in a collective, institutionalized way in the early 1990s".[53] Stryker argues that although the 1990s saw the term enter widespread use, its history and development is intricate.[54] Historically, an individual whose gender identity did not correlate with their biological sex and who wished to alter their sexual characteristics so to reflect their gender identity was often labelled a 'transsexual'. This term implies that an individual has or wants to have gender affirming surgery. Similarly, individuals who dressed up as the opposite sex were labelled as 'transvestites'.[55] A dominant perspective of transvestites is that they cross-dress for erotic pleasure. In this research 'transgender' is given preference over the term 'transsexual', as the term offers the ability to incorporate a variation of experiences and expressions present. Furthermore, due to its stigmatised and pejorative nature, the term 'transvestite' is disregarded in this research.[56]

When discussing individuals with non-normative gender identities, another relevant term is 'queer'. As an adjective, queer refers to anything which is oppositional to what is normative, often in the context of conservative and conventional norms regarding sexual orientation, sexual activities, gender identities and/or expressions.[57] African transgender women are included within the category of queer individuals but the intricacies of 'queer' and queer legal theory as well as their linkages to transgender women are further discussed under 2 4. The description of a 'non-normative' gender identity is used interchangeably with queer to refer to non-conformance within the

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[50] Stryker *Transgender History* 1.
[51] Gonzalez-Salzberg (2014) *American University International Law Review* 817.
[52] Kara *Gender is not an illness* (2017) 18.
[53] L Feinberg *Trans Liberation: Beyond Pink or Blue* (1998) 30.
[54] Stryker *Transgender History* 36.
[55] BL Hausman *Changing Sex: Transsexualism, Technology, and the Idea of Gender* (1995) 8.
[56] Prager *Queer, There* 225.
[57] AP Romero "Methodological Descriptions: "Feminist" and "Queer" Legal Theories" in M Fineman, J Jackson & A Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) 190.

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context of gendered social norms. African transgender women are described to have non-normative gender identities because they do not conform to the gender binary.

Lastly this research makes reference to SOGI rights as opposed to LGBTQI (lesbian, gay, bisexual, transgender, queer and intersex) rights, due to the fact that the SOGI categorisation is comparatively culturally neutral.[58] In contrast, the LGBTQI acronym is deeply rooted in the gay rights activism of the United States of America and even though it has expanded to ensure a wider range of inclusion, it still requires individuals to identify within a specific category i.e. 'lesbian', 'gay', bisexual' and/or 'transgender'.[59] This identification can make the task of being accepted and understood burdensome on queer individuals, as many express themselves contrary to typically accepted LGBTQI identities.[60] It has to be further noted that the terms used within the narrative of the global north are often unrelatable for many queer African individuals, including transgender women. Clarke argues that 'western' queer philosophies "ultimately fail because they do not take into account the cultural differences that exist in multicultural/cross-cultural countries".[61] It is important for queer (which is also a borrowed term) Africans, including African transgender women, to be able to create and use neutral and unbiased terms in order to understand their lived challenges without having to subscribe to foreign cultural representations. As summarised by Nyanzi:

> "It is important to constantly interrogate, debunk, dismantle and queer the culturalist or reified traditional logic when it is appropriated to consolidate oppression, especially when embedding that oppression in legislative processes".[62]

Thus, SOGI is used in this research to allow for greater inclusion when referring to individuals in Africa who are marginalised as a result of their non-normative gender identity - in whatever form that may be. Forcing individuals to conform to one of the categories within the LGBTQI acronym in order to be legally recognised and have their human rights protected is problematic as it can stifle and restrict an individual's self-development. It is also contrary to the principle of universality as well as the rights to

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[58] JM Voss "Contesting Sexual Orientation and Gender Identity at the UN Human Rights Council" (2018) 19 *Human Rights Review* 3.
[59] Prager *Queer, There* 161-168.
[60] P Califia "Gay Men, Lesbians, and Sex: Doing It Together" in I Morland & A Willox (eds) *Queer Theory* (2005) 22-27.
[61] D Clarke "Twice removed: African invisibility in Western queer theory" in E Ekine & H Abbas (eds) *Queer African Reader* (2013) 182.
[62] S Nyanzi "Afterword: Sexing the Law and Legislating Gendered Sexualities" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 75.

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equality and non-discrimination which are discussed under 2 5 1. SOGI can be used as a point of departure to establishing a general context for non-normative and queer individuals in Africa and discuss the protection of their human rights. It has to be noted, however, that it is not used in this research to generalise nor subsume the experiences of African transgender women to other African individuals with non-normative SOGI.

2 3 Post-modern intersectional feminist legal theory

As noted, gender and sex are not interchangeable terms. Relevant to this is the fact that feminist theory emphasises that sex is biological and gender is psycho-social.[63] This psycho-social aspect of an individual's identity is defined as their gender identity, which is decided based on the internal experience of self and how this is displayed and communicated externally, rather than as a reflection of their biological sex.[64] Consequently, post-modern intersectional feminist legal theory contributes to this research with its ability to deconstruct the notion of 'gender' and examine what encompasses the identity of 'women'. The application of the theory is especially useful when establishing whether transgender women can be seen to exist, legally speaking, within the regularly applied interpretation of the term 'women'. This is especially relevant to the fact that instead of the term 'sex', the wider descriptive term 'gender' is used as the distinguishing criteria for 'women' in the Maputo Protocol.[65] Thus, a related analysis is especially useful in establishing the protection of the particular rights of African transgender women, as discussed in the following chapters, from a legal narrative pertaining to 'women' and 'gender'.[66] This is in consideration of the fact as discussed: that gender identity, rather than sex, is decisive when determining an individual's gender.

Feminism as a movement is grounded in establishing equality between men and women in all social, political and economic spheres of life.[67] It aims to analyse the unequal distribution of power and privilege incurred by gender roles in society and through exposing it, provide a developmental directive towards increased equality.[68] The role of feminism has been expanded by the general perspective of post-modernist

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63 Butler *Gender Trouble* 8.
64 "Yogyakarta Principles" (2007) 2 <http://www.yogyakartaprinciples.org/principles_en.htm> (accessed 04-05-2018).
65 Butler *Gender Trouble* 9.
66 Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 246.
67 Chamallas *Introduction to Feminist Legal Theory* 1.
68 2.

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thought, rejecting dominant narratives and ideologies.[69] Post-modernism, integrated with feminism as well as feminist legal theory, allows for the inclusion of an intersectional epistemology offering the potential to transcend the dominant understanding of what a woman is (white, straight, cisgender and middle class as reflected in the earliest phases of feminism), what encompasses her oppression and how gender affects her lived experiences.[70] Post-modern feminist legal theory effectively provides the tools to deconstruct the social identities and legal assumptions that affect the broader grouping of *all* women, irrespective of their race, class, sexual orientation and/or gender identity.

The origins of feminism stem from the acknowledgment of the biological differences between men and women and the respective rejection of the notion that such differences justify men's power and privilege alongside women's subordination.[71] The concept of biological determinism, as mentioned under 2 2, is criticised by feminists as restrictive to women's potential, placing artificial boundaries on the roles they may pursue whilst allowing men greater freedom of self-determination. Partial to such a 'biologically determined' narrative fuelled by stereotypes, a woman is largely expected to assume the role of a stay at home mother whilst a man is expected to take on the responsibility of being the sole the bread-winner of the family. Such expectations are as burdensome on men as they are on women.[72]

The integration of feminism within the legal framework is established in feminist legal theory, focusing on recognising the role of the law in governing women and the inherent manifestations of their implied inferiority to men. At its core, feminist legal theory recognises that an individual's gender influences how they are treated as a legal subject. Advocates of feminist legal theory emphasise that being a man or a woman has a significant impact in the majority of people's lives.[73] Feminist legal theory is especially valuable in exposing gender biases in the law and establishing ways in which stereotypical legal predispositions can be challenged.[74]

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[69] F Valdes "Queering Sexual Orientation: A Call for Theory as Praxis" in M Fineman, J Jackson & A Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) 98.
[70] Chamallas *Introduction to Feminist Legal Theory* 7.
[71] MA Fineman "Introduction: Feminist and Queer Legal Theory" in M Fineman, J Jackson & A Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (2009) 2.
[72] Chamallas *Introduction to Feminist Legal Theory* 5.
[73] 1.
[74] Romero "Methodological Descriptions" in *Feminist and Queer Legal Theory* 197.

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The principle of intersectionality was first introduced by Crenshaw, designed as a responsive tool within black legal feminist thought.[75] It analyses how multiple systems of oppression intertwine, disproportionality affecting marginalised social groups. Initially, the principle focused on how African American women simultaneously experience discrimination based on both their gender and race. However, more recently it is considered applicable for varying intersecting discriminatory grounds. As described by Stoljar:

> "[The] basic idea is that disadvantage does not [occur] exclusively along a single axis of social identity or group membership, but rather as multiple bases; further disadvantage is often compounded due to individuals' multiple, intersecting group identifications".[76]

Intersectionality is a particularly useful tool within the African regional context. Banda argues that the application of intersectionality in Africa can be "particularly helpful when considering the lives of African women, not least because more often than not, they suffer multiple and intersecting discrimination".[77] Intersectionality emphasises the interplay of identity politics where an individual is simultaneously member to more than one minority group. As an example, whereas an individual may be discriminated against in society based on their race, their lived experience of social oppression will be exacerbated if that same individual is transgender and/or poor. In this way, the disadvantage an individual may experience becomes further compounded as a result of the respective social groups they are positioned in.[78] Fineman argues that intersectionality acts as a reminder that the unique lived experiences specifically related to an individual's position in life can result in "cumulative, hybrid, and extraordinary oppression".[79]

2 3 1 Transgender women in the feminist matrix

One of the most fundamental and simultaneously contradictory aspects of understanding the concept of gender is how it must first be acknowledged in order to be undermined. Lorber emphasises that "the prime paradox of gender is that in order

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[75] K Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 8 *University of Chicago Legal Forum* 145.
[76] N Stoljar "Discrimination and Intersectionality" in K Lippert-Rasmussen (ed) *The Routledge Handbook of the Ethics of Discrimination* (2018) 70.
[77] F Banda *Women, Law and Human Rights an African Perspective* (2005) 7.
[78] Stoljar "Discrimination and Intersectionality" in *The Routledge Handbook of the Ethics of Discrimination* 68.
[79] Fineman "Introduction: Feminist and Queer Legal Theory" in *Feminist and Queer Legal Theory* 4.

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to dismantle the institution, you must first make it very visible".[80] Accordingly, there is a conflict between some feminist theorists regarding the role and emphasis of gender.[81] As a point of departure, it is worth noting how some theorists argue that the gender distinction and establishment of a solidary group-identity for women is crucial to achieve feminist goals. These theorists often align themselves with the notion of gender essentialism as discussed beforehand under 2 2.[82] Opposing feminist theorists challenge gender essentialism and argue that focusing on a binary gender distinction leads to an over-emphasis of gendered differences. This in turn, further isolates the genders and undermines the pursuit of equality.[83]

This particular conflict is exacerbated with regard to transgender women. A selection of feminist legal theorists, including Raymond, Morgan and Jeffreys, challenge the notion that transgender women are in fact women.[84] They contest transgender women's ability to associate themselves with feminism if they choose to identify as women as such identification "reinscribe[s] gender as a binary category".[85] These theorists further criticise the subscription of transgender women to the female gender as opposed to their biological sex based on the opinion that gender is a social construction.[86] This, however, represents a gross oversimplification of the issue as these beliefs often serve as the foundation of transphobic human rights violations.[87] This is further discussed under 4 4 2.

Transgender individual's gender identities and expressions form a central aspect of their identity and personality. Undermining their lived experiences as transgender is counterproductive in the pursuit of gender equality and adds to a growing dissonance within the feminist community.[88] Stryker argues that "transfeminism" is required moving forward: allowing for a feminist perspective rooted in intersectionality which is "explicitly trans-affirming".[89] Using the term created by Koyama, Stryker argues that:

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80 J Lorber "Paradoxes of Gender" 10 quoted in Oyèrónke *The Invention of Women* xv.
81 Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 245.
82 Chamallas *Introduction to Feminist Legal Theory* 94.
83 Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 245.
84 M Goldberg "What is a woman? The dispute between radical feminism and transgenderism" (28-06-2014) *The New Yorker* < https://www.newyorker.com/magazine/2014/08/04/woman-2> (accessed 10-06-2018).
85 Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 245.
86 252.
87 E Baisley "Reaching the tipping point? Emerging international human rights norms pertaining to sexual orientation and gender identity" (2016) 38 *Human Rights Quarterly* 157.
88 Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 253.
89 Stryker *Transgender History* 5.

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> "It is neither radical nor reactionary to embrace a trans identity. Non-transgender people, after all, think of themselves as being women or men, and nobody asks them to defend the political correctness of their "choice" or thinks that their having a sense of being gendered somehow compromises or invalidates their other values and commitments".[90]

Consolidating the theoretical perspective discussed, post-modern intersectional legal feminism has the potential to strike a balance by supporting the notion of an intersectional group identity for women which could specifically aid in protecting and uniting women in their pursuit of equality. It would enable a needed differentiation of the current pretence that all women experience the same level of oppression and/or persecution for their identities and lifestyles.[91] This is explicitly useful for transgender women as they are often the most vulnerable to discrimination for their non-normative gender identities.

2 3 2 African legal feminism

As this thesis centres on the interpretation of the Maputo Protocol, which specially focuses on the rights of women in Africa, it is necessary to outline the cultural and legal context of African feminism and its connection with general and/or 'international' feminism. Banda discusses the inherent conundrum in which African women are asked to accept international norms in human rights discourses which are not relevant nor appropriate for their respective cultural, socio-economic and legal contexts. According to her, African women have continuously been advised that the law is neutral and treats all subjects the same, which she argues is a fallacy.[92] Generally, African feminism provides a narrow lens focusing on the socio-economic and historical context of the development of the rights on the continent and the position of African women specifically. This focus is especially valuable in the context of this research as it would be inadequate to discuss feminism in a global context without a discussion of the specific experiences encountered within the continent when attempting to interact with the provisions of the Maputo Protocol.

African feminism is particularly important in refuting the implied universal experience of feminist rights and responsibilities as outlined under 2 3. Furthermore, African feminism contradicts the philosophies underlying gender essentialism; which effectively treat the experiences of women from the global north as the norm of

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[90] Stryker *Transgender History* 6-7.
[91] Chamallas *Introduction to Feminist Legal Theory* 106.
[92] Banda *Women, Law and Human Rights* ix.

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women's experiences worldwide.[93] It is necessary for African women to have the ability to forge their own paths of understanding and context of what it means to be a woman in Africa. As suggested by Nyanzi:

> "Feminist and queer knowledge in Africa must use innovative stylistics to capture the imagination and thinking of its consumers in order to undo normative and often oppressive modes of thought and knowing".[94]

The diverse approaches of African feminism focus on resisting, not only patriarchal values, but also western hegemonic structures which in combination with racism on the continent, have resulted in an enduring legacy that has become embodied within African culture.[95] Historically, Africa's political make up was distinct from that of other regions as it included a significant amount of high-status female positions. This included female chiefs, matriarchs as well as priestesses.[96] As described by Mikell, the onset of colonialism brought with it a new 'gender bias' and encouraged a reduction of women's position in society to include only their "productive and reproductive abilities".[97] This prompted the shift to a 'western' organisational culture aligned to a biologically determined *modus operandi.* Even with the end of colonialism and the emergence of new independent and democratic African states, a dominant issue emerged where African women were encouraged to prioritise nationalism over feminism.[98] In order to create 'national unity' (or at least the appearance thereof) women in positions of power were encouraged to highlight the issues and progress of all Africans rather than specifically focus on the experiences and hardships of being an African woman in these new states. Mikell describes the dilemma African women found themselves in as they were forced to support the creation of new policy structures and processes with encouraged legitimacy whilst abandoning women's rights to substantial participation in important matters.[99] She further suggests that:

> "Since gender ideologies are actualised within the context of social interaction, African women must draw threads of continuity within African culture while reinterpreting them as they see fit".[100]

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93 Banda *Women, Law and Human Rights* 8.
94 S Nyanzi "Afterword: Sexing the Law and Legislating Gendered Sexualities" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 67.
95 G Mikell "Introduction" in G Mikell (ed) *African Feminism The Politics of Survival in Sub-Saharan Africa* (1997) 4.
96 Mikell "Introduction" in *African Feminism* 11.
97 18.
98 123.
99 G Mikell "Conclusions: Theorizing and Strategizing about African Women and State Crisis" in G Mikell (ed) *African Feminism The Politics of Survival in Sub-Saharan Africa* (1997) 334.
100 Mikell "Conclusions" in *African Feminism* 341.

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The principle of intersectionality features in this context as a relevant methodological tool for African feminists. Although a design of African-American legal thought, it's scrutiny of interacting systems of oppression is reflective of the experience of African women and can help in constructing a productive and contextually sensitive epistemology.[101] Moreover, post-modernism is useful as a confirmation that African women can conceptualise their own identities as well as what it means to be an African woman.

2 4 Queer legal theory

2 4 1 The general operation of queer legal theory

Whereas feminist theory acknowledges and operates within gendered and sexual categories to overcome their confines, queer theory as an epistemology works to challenge the validity of such categories.[102] Queer theorists argue that the binary categories of gender and sexuality are neither natural nor pre-determined, but instead social constructions which place limitations on an individual's identity and personal development.[103] As defined under 2 2, queer is a descriptive term. In its rejection of dominant narratives and ideologies, it is inherently post-modern.[104] Morland and Willox argue that "queerness calls at once for a celebration of a diversity of identities but also for a cultural diversity that surpasses the notion of identity".[105]

Queer theorists acknowledge that identities are complex and envision freeing individuals from societal constraints to shift the focus away from what they 'are' to the various ways they 'perform' their respective identities.[106] As encapsulated by Keprose, the core of queer theory is to expose:

> "[T]he manner in which heterosexuality has, silently but saliently, maintained itself as a hidden yet powerfully privileged norm; and an implicit, if not explicit, questioning of the goals of formal equality that, on their face simply reify the very categories that have generated heterosexual privilege and queer oppression".[107]

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[101] O Awino "In sisterhood and solidarity: queering African feminist spaces" in E Ekine & H Abbas (eds) *Queer African Reader* (2013).
[102] Romero "Methodological Descriptions" in *Feminist and Queer Legal Theory* 190.
[103] 193.
[104] SD Walters "From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace" in I Morland & A Willox (eds) *Queer Theory* (2005) 7.
[105] I Morland & A Willox "Introduction" in I Morland & A Willox (eds) *Queer Theory* (2005) 3.
[106] Butler *Gender Trouble* 34.
[107] L Keprose "Queer theory: Weed or seed in the garden of legal theory?" (2000) 9 *Law and Sexuality* 279 quoted by M Fineman "Feminist and Queer Legal Theory" in *Feminist and Queer Legal Theory* 5.

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Through these fundamental notions, queer legal theory is useful in recognising the fluidity of identities and assists in exploring whether transgender women can be included under the term 'women'. In this research, this supports the assumption that African transgender women can be interpreted as legally protected subjects under the Maputo Protocol.

As noted under 2 3 1, some feminist legal theorists struggle to recognise the link between transgender women and the 'woman question'. This can be attributed to the fact that often transgender women actively live and subscribe to certain feminine gender norms, which manifests in them physically presenting themselves in particular, and arguably stereotypical, ways.[108] Marcus advocates that the existence of queer theory is confirmation that the concept of women is mobile and thus undoubtedly includes transgender women.[109] Currah suggests that in adopting a 'gender pluralism', all individuals, in their respective embodiments of gender (whether confirmed in the binary, completely rejected or somewhere in between) will be able to be regarded and protected as legal subjects.[110]

Nonetheless, some queer theorists are suspicious of the role of the law and have doubts about its value to queer individuals as many experience the law to "regulate, rather than liberate, them".[111] Nonetheless, it is argued that queer legal theory can contribute to an inclusive application of the law which treats all individuals as equal legal subjects, irrespective of their gender identity. Currah argues that individuals should not be required to comply with heteronormative standards of gender expression in order to be regarded as protected legal subjects.[112] Greater inclusion is further in line with the principle of universality as discussed under 2 5 1 as it is argued that no aspect of an individual should affect their ability to be recognised and protected by the law. The role and function of dignity as discussed under 3 2, expands on this argument.

As with feminist legal theory, intersectionality is similarly applicable to queer legal theory. An example of an intersectional analysis of queer theory is presented in 'quare theory'. As conceptualised by Johnson, quare theory is a re-articulation of queer

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108 Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 252.
109 Vollmer *Queer Families* 42.
110 Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 255.
111 Chamallas *Introduction to Feminist Legal Theory* 225.
112 Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 255.

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knowledge through a racially sensitive lense.[113] It specifically highlights the effort required in achieving all-encompassing equality in the face of intersectional oppression.[114] Quare theory stipulates that queer theory is not immune to racial prioritisation and substantiates that the lived experiences of many black queer individuals are not represented in the dominant queer narratives, which are often based on a perspective of white individuals.[115] This expression of intersectionality is especially pertinent when attempting to destabilise dominant narratives which have the potential to shed light on the often invisible experiences of marginalised individuals such as African transgender women.

2 4 2 Queer legal theory in the African human rights system

Within the realm of a generally religious and culturally conservative continent, African transgender individuals, whose identities do not align within the heteronormative binary, are frequently deemed to be 'un-African'.[116] Many communities view them as a threat to the notion of the traditional nuclear family and the proper functioning of African society.[117] On the African continent masculinity is often prioritised and thus transgender women are habitually seen as threats to 'African values'.[118] As described by Boswell, the presence of "deviant femininity" is charged as "un-African" because it challenges African hegemonic masculinity, patriarchy and heteronormativity which "prescribes, upholds and naturalises traditional, static gender roles".[119] One of the most significant, yet false, impressions which affects the perception of African transgender women is the common belief that they are not women, but rather homosexual men. This perception relates to when an individual who was born as a biological male does not present typically masculine and is automatically assumed to be homosexual. This view is especially problematic as it often results in the persecution and prosecution of transgender women based on the criminalisation of

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113 EP Johnson ""Quare" studies, or (almost) everything I know about queer studies I learned from my grandmother" (2001) 21 *Text and Performance* 3.
114 Johnson (2001) *Text and Performance* 4.
115 18.
116 AM Ibrahim "LGBT rights in Africa and the discursive role of international human rights law" (2015) 15 *AHRLJ* 266.
117 Vollmer *Queer Families* 16.
118 S Olaoluwa "The human and the non-human: African sexuality debate and symbolisms of transgressions" in Z Matebeni, S Monro & V Reddy (eds) *Queer in Africa: LGBTQI Identities, Citizenship, and Activism* (2018) 21.
119 B Boswell "On Miniskirts and Hegemonic Masculinity: The ideology of deviant feminine sexuality in anti-homosexuality and decency laws" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 52.

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homosexuality.[120] Currently, homosexuality is still criminalised in many African states.[121] Mukasa, commenting on the misplacement of homophobia towards transgender individuals, sets out how:

> "Any person that expresses [themselves] as the opposite sex is a homosexual and so this exposes transgender people to all the mistreatment. All transgender people are seen as the obvious homosexuals. Therefore, on top of all the transphobia, there is homophobia, even if you are not gay".[122]

This conviction is poignant when analysing why transgender women experience such intense stigma and are often not provided suitable and adequate legal protection of their identities, bodies and lives. The invisibility of African transgender women is further discussed under 3 4 1.

Currently, out of the 41 State Parties to the Maputo Protocol, transgender individuals are only explicitly legally recognised and provided for in South Africa through the Alteration of Sex Description and Sex Status Act 49 of 2003 ("The Alteration of Sex Description Act").[123] This absence of regulatory and/or protective legislation for transgender individuals within the State Parties is alarming. Its absence has a detrimental effect on the enjoyment of their human rights, as their marginalisation and stigmatisation is continuously overlooked.

The process of transitioning to reflect an individual's gender identity (with or without surgery) often only occurs during adulthood. Especially in the case of transgender women, a late transition results in increased visibility as non-normative in their adult life because they go through puberty as biologically male. In contrast, transgender men often have an easier time 'passing' in their gender identity.[124] Being more conspicuous than transgender men, transgender women are more likely to become targets of harassment, discrimination and violence causing them to be an inherently vulnerable social group.[125] Oloka-Onyanga, focusing on the position of individuals with non-normative gender identities in Uganda and Kenya, elaborates that transgender women are subjected to:

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[120] Oloka-Onyango (2015) 15 *AHRLJ* 35.
[121] ILGA: LR Mendos *State-Sponsored Homophobia 2019* (2019) 197-202.
[122] G Le Roux "Proudly African and Transgender" in E Ekine & H Abbas (eds) *Queer African Reader* (2013) 67.
[123] Alteration of Sexual Description and Sex Status Act 49 of 2003.
[124] T Bahrampour "Crossing the divide: Do men really have it easier? These transgender guys found the truth was more complex" (20-06-2018) *The Washington Post* <https://www.washingtonpost.com/news/local/wp/2018/07/20/feature/crossing-the-divide-do-men-really-have-it-easier-these-transgender-guys-found-the-truth-was-more-complex/?noredirect=on&utm_terms=.0bb33d774e22> (accessed 10-08-2018).
[125] Oloka-Onyango (2015) 15 *AHRLJ* 49.

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> "[A]ll forms of harassment, including hate crimes, especially on account of the charge against transgender women that they are masquerading in order to dupe and extort money from the public, or the alternative claim that they are homosexual, confusing the issue of gender identity and sexual orientation. Others have faced lynch mobs and have been beaten, aside from being ostracized, barred from housing and suffering all manners of discrimination in their places of employment, as well as with immigration officers who accuse them of impersonation".[126]

Queer legal theory and its deconstruction of the binary concept of gender can aid in dismantling the colonial heritage of heteronormative boundaries within African communities. In turn, this could increase the general acceptance of African transgender women among the diverse societies and help augment their legal protection. Such a development, however, requires African people to work autonomously rather than to duplicate established forms of activism created in the global north in an attempt to affect change.[127] As echoed by Nyanzi, queer legal theory is insightful in its enquiry:

> "What are the implications of legislating non-heteronormative gender identities and sexual practices in society? Apart from statutory laws, what alternative frameworks for managing the national standards of being appropriately gendered and sexualised citizens exist, if such standards should exist at all?"[128]

Higginbotham and Collis-Buthelezi argue that the vulnerable position of African transgender women is attributable to politically motivated stances; often with life threatening implications.[129] This is taken as far as government officials using non-normative individuals as scapegoats, arguing that the 'moral decay of society' is a result of them destroying 'African culture' in an attempt to distract from incompetence and/or corruption within their own systems.[130] Henceforth, it is crucial to destabilise the legal heteronormativity and hegemony in order to ensure the legal protection and safety of African transgender women. Applying queer legal theory in an African context has the potential to promote an empowered methodology in which queer individuals are treated equally. For African transgender women specifically, its application, as argued in this research, can help in the production and promotion of knowledge which encourages the understanding that they are both human and women. This, in turn, would undoubtedly entitle them to the legal protection of their fundamental human rights.

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126 Oloka-Onyango (2015) *AHRLJ* 50.
127 Banda *Women, Law and Human Rights* 44.
128 Nyanzi "Afterword" in *Contested Intimacies* 66.
129 D Higginbotham & V Collis-Buthelezi "Introduction" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) xvii.
130 CF Edozien *Lives of Great Men* (2018) 121.

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2 5 Fundamental principles of international human rights law

As mentioned under 1 1, the principle of universality as well as the rights to equality and non-discrimination are the focus of this thesis, particularly in application to transgender women. Accordingly, the analysis in this subsection initially sets out the general principle and rights and thereafter highlights their relevance for the State Parties to the Maputo Protocol.

2 5 1 Universality, equality and non-discrimination

The principle of universality in international human rights law centres on the notion that there is an "essential and fundamental sameness of humankind".[131] Accordingly, human rights are afforded to all individuals on the basis that they are human. The principle of dignity, which is an inherent characteristic in all individuals, affirms this understanding and substantiates the protection of their human rights. The principle of dignity is discussed in detail in chapter 3. Furthermore, the rights to equality and non-discrimination ensure that entrenched human rights are afforded to all individuals regardless of any grounds, including their demographic and/or cultural background.[132]

Historically international law only engaged with states, rather than individuals, as the subjects of the law.[133] However, after the repercussions of the Second World War, the international community pursued a focus on individual accountability and protection which resulted in the establishment of international human rights law.[134] Soon thereafter, the UDHR was concluded, which would later shape the content of the Charter of the United Nations ("UN Charter"). As illustrated in Article 55:

> "[T]he United Nations shall promote: (…) universal respect for, and observance of, human rights and fundamental freedoms for all".[135]

The UDHR stipulates that all human beings are born free and equal and that all human rights are universal, indivisible, interdependent and interrelated.[136] Although the UDHR is a non-binding declaration, the rights and principles it contains function as the foundational values of the international community.[137] As described by Rudman:

> ""[U]niversal" signifies that *all* human rights are attached to *all* human beings, accepted by *all* states at *all* times. The definition of "universal" in the UDHR means it is not conditional

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131 A Fagan & H Fridlund "Relative Universality, Harmful Cultural Practices and the United Nations' Human Rights Council" (2016) 34 *Nordic Journal of Human Rights* 22.
132 BG Ramcharan *The Fundamentals of International Human Rights Treaty Law* (2011) 34, 69, 78.
133 Wallace & Martin-Ortega *International Law* 2-4.
134 5.
135 (entered into force 24 October 1945) 1 UNTS XVI.
136 Wallace & Martin-Ortega *International Law* 244.
137 Wallace & Martin-Ortega *International Law* 35.

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> on a widespread acceptance – it is a pre-condition upon which the human rights law regime rests".[138]

The process through which the status of being 'human' is bestowed on to individuals is a contentious issue, especially when considering the subject of gender. To illustrate this point, Gonzalez-Salsberg contends that gender has become such an important social signifier that an individual is only recognised as human once gendered; this can be seen in the priority of identifying a baby as a boy or girl immediately after birth.[139] Concerning the recognition of the inherent humanity of all individuals; neither their sex nor gender identity should be a decisive factor. Whittle argues that "the human is first, the gender is an addition".[140]

Furthermore, the focus on the birth sex itself often creates enduring stereotypical expectations on the child and undermines the complex manner in which identity develops. Feinberg argues that transgender lives are an example of how sex and gender are more intricate and complicated than "a delivery room doctor's glance at genitals can determine, more variegated than pink or blue birth caps".[141] As suggested by Baisley, being human is sufficient criteria in order to be afforded basic human rights. Any distinction in their application between individuals based on any ground, is erroneous.[142] As argued throughout this research, this includes the ground of gender identity. The Yogyakarta Principles emphasise that:

> "All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible and interrelated. Sexual orientation *and gender identity* are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse". [emphasis added][143]

Notwithstanding the acceptance of equality and non-discrimination as paramount to universality, the scope of universality, as a principle, has developed over time, and seems to continuously be developing.[144] Similarly, as held by Lau, even though "states readily agree that human rights should be protected by international law, the definition and scope of human rights remains contested".[145] From a historical perspective, the

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138 A Rudman "The protection of SOGI rights under international human rights law: An analysis of the African voice of divergence and the use of the persistent objector doctrine" (2019) 22 *PER/PELJ* 9.
139 Gonzalez-Salzberg (2014) *American University International Law Review* 798.
140 S Whittle "Gender Fucking or Fucking Gender?" in I Morland & A Willox (eds) *Queer Theory* (2005) 128.
141 Feinberg *Trans Liberation* 5.
142 Baisley (2016) *Human Rights Quarterly* 159.
143 "Yogyakarta Principles" (2007) 6 <http://www.yogyakartaprinciples.org/principles_en.htm> (accessed 04-05-2018).
144 IG Shivji *The Concept of Human Rights in Africa* (1989) 45.
145 H Lau "Sexual Orientation: Testing the Universality of International Human Rights Law" (2004) 71 *The University of Chicago Law Review* 1692.

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natural law arguments of the 17th century determined that universal human rights were afforded to 'man'. Shivji criticises this distinction to exclude both women and slaves; marking a formal differentiation between beneficiaries of human rights.[146] Nowadays, it is clear than any distinction between individuals based on their race or sex, or any other grounds which would deprive them of enjoying their human rights, is clearly contradictory to international human rights law and the rights to equality and non-discrimination.

The preamble to the Maputo Protocol confirms article 2 of the African Charter which lists the right to non-discrimination on the grounds of "race, ethnic group, colour, sex, language, religion, political or any other status". The African Court in *African Commission v. the Republic of Kenya ("Kenya")*[147] stated that:

> "The expression of 'any other status' under Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the African Charter. In determining whether a ground falls under this category, the Court shall take into account the *general spirit* of the Charter" [emphasis added].[148]

Therefore, it is put forward that a teleological interpretation of the Maputo Protocol confirms that gender identity is a ground which warrants assurance of non-discrimination. Brown argues that the principle establishing all human rights to be 'universal' is "as old as international human rights law itself".[149] However, it is important to acknowledge that social, political and legal beliefs affect this understanding and application. Nonetheless, the universal protection of human rights is inherently connected to the notion that all human beings are fundamentally equal (as embodied in the principle of equality) and that non-normativity is not justification for the deprivation or violation of human rights (as embodied in the principle of non-discrimination). This is just as true for African transgender women as for any individual, notwithstanding the arguments presented below.

2 5 2 Relativism

As discussed under 2 5 1, the principle of universality determines that human rights are bestowed on, and shared by, all human beings.[150] In contrast, the principle of relativism presents a pluralistic approach, which argues for the interpretation of rights

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[146] Shivji *The Concept of Human Rights in Africa* 46.
[147] Application no 006/2012.
[148] Para 138.
[149] D Brown "Making room for sexual orientation and gender identity in international human rights law: An introduction to the Yogyakarta Principles" (2010) 31 *Michigan Journal of International Law* 847.
[150] (adopted 10 December 1948) UNGA Res 217 A (III).

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in consideration of specific cultural contexts rather than presupposing their universal application.[151] It effectively provides a platform for subjective views on morality and ethics, which infers that human rights only exist within the specific cultural context in which they fall. The principle of relativism exhibits a clear antithesis to the principle of universality in reasoning that the respective context should alter the way that human rights are understood and applied. Relativism is particularly important to consider when reflecting on the justifications presented by State Parties used to persecute individuals with non-normative gender identities.

At present, the international legal community is divided on whether the principle of universality is applicable to transgender rights (as part of the wider consideration for SOGI rights), or whether it forms part of an attempt to create new normative claims which currently do not have an existing foundation in international law.[152] Colonialism, imperialism, racism and religious beliefs have been acknowledged as pertinent historical justifications of human rights violations in the past. Today, the culture of heteronormativity can be equated as a principal basis of discrimination. This culture of heteronormativity is particularly significant in the African human rights system.[153]

An example of this contention can be found in the debate which took place at the UN Human Rights Council in 2016. During a Council sitting, Resolution 32/2, with the objective to set up a mandate to establish an Independent Expert on SOGI Rights, was presented.[154] A clear division emerged between states advocating for protection of SOGI rights versus states who implied that the Resolution was an imposition to create 'new' international law. During the debate, both factions argued their positions as 'universal' and their opponents' positions as 'relativist'.[155] The states opposing SOGI rights insisted that the protection of SOGI rights would "corrupt the morals of the international community".[156] They further justified their argument by contending that the states advocating for SOGI protection were actively encouraging people to *become* homosexual or transgender. The essence of this argument is reflected in the statement made by the Nigerian Ambassador:

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151 Voss (2018) 19 *Human Rights Review* 12.
152 Baisley (2016) *Human Rights Quarterly* 138.
153 Voss (2018) *Human Rights Review* 13.
154 HRC 'Protection against violence and discrimination based on sexual orientation and gender identity' 33rd session (15 July 2016) A/HRC/RES/32/2.
155 Voss (2018) *Human Rights Review* 1.
156 Voss (2018) *Human Rights Review* 16.

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> "My government, indeed many governments, seriously object to [SOGI rights] as human rights and have legislated against those rights because it offends their culture, religion and natural laws (…) The opposition to this resolution is to ensure the sanctity of other rights, such as rights to religious beliefs, and culture, and the supremacy of natural laws".[157]

The grounds of equality and non-discrimination, as mentioned under 2 5 1, advocate that all individuals deserve equal protection of their human rights. The argument presented by relativists that their national religion or cultural norms are a valid justification to withhold the rights of certain individuals as well as to undermine their dignity based on their gender identity, fundamentally contradicts the values of international human rights law. This is further explored under 4 3 2. Moreover, the states who advocated for SOGI rights at the Council sitting expressed that they were not trying to promote the lifestyles of individuals with non-normative SOGI but rather that they were concerned about these individuals' ability to have their fundamental human rights protected.[158]

As is clear from the discussion surrounding Resolution 32/2, establishing consensus on the universal protection for SOGI minorities is a highly complex issue, especially considering that many states continue to support the viewpoint that these non-normative individuals are "the antithesis of morality".[159] Despite this contention, SOGI rights are increasingly being normalised and, on the premise of equality and non-discrimination as equal grounds, are becoming more included in discussions of human rights protection within the international legal community. They find representation in policies of many UN member states and are adopted by a large number of UN committees and bodies. Resolution 32/2 was successful with 23 states voting yes, 18 states voting no and 6 states abstaining.[160] Accordingly, since 2016, the Independent Expert on SOGI has been operational. The statement made by the Ghanaian representative illustrated a positive shift for states prioritising universal human rights protection even in light of "very sensitive" cultural issues, due to an "evolution of thinking", specifically acknowledging Resolution 275.[161] On the 12th of July of 2019, the mandate was renewed with 27 states voting yes, 12 states voting no

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[157] 12.
[158] 7.
[159] 2.
[160] Allied Rainbow Communities International & ILGA *Compilation of the Adoption of the 2016 SOGI Resolution* (2016) 3.
[161] Allied Rainbow Communities International & ILGA *Compilation of the Adoption of the 2016 SOGI Resolution* (2016) 98.

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and 7 states abstaining.[162] The OHCHR summarised the shifting international position in the following way:

> "Protecting [SOGI] people from violence and discrimination does not require the creation of a new set of [SOGI]-specific rights, nor does it require the establishment of new international human rights standards. The legal obligations of States to safeguard the human rights of [SOGI] people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly".[163]

Specifically within religious states, developing nations and previously colonised territories, a pushback against 'global morals' is understandable considering historically unjust and biased laws which prioritised archaic European, Christian and/or 'western' values. However, as argued in this research, a clear balance must be drawn between respecting state sovereignty, which includes the respect for different religions and cultural beliefs, and acknowledging that human rights are inalienable, bestowed on all individuals and cannot be derogated from within the realm of international human rights law.

2 6 Treaty interpretation

In relation to the general discussion on the protection of SOGI rights under international human rights law, it is important to acknowledge the function of international treaties. Treaties guide states in establishing consensus and standards of human rights protection that prevail regardless of any contradictory national law.[164] As mentioned under 1 1, treaties are crucial instruments as they codify rights and obligations to keep states accountable. As this research focuses on an analysis of the ability of international human rights law to recognise and protect African transgender women and their human rights through the Maputo Protocol, this can only be

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[162] M Chirinos "U.N. Human Rights Council Votes in Favor of Independent Expert to Protect LGBTQ People Worldwide" *Human Rights Campaign* (12-07-2019) <https://www.hrc.org/blog/u.n.-human-rights-council-votes-in-favor-of-LGBTQ-independent-expert> (accessed 23-07-2019); HRC 'Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 41st session (10 July 2019) A/HRC/41/L.10/Rev/1. It is noteworthy that of the African states who are also State Parties to the Maputo Protocol, only Rwanda and South Africa voted to renew the mandate.

[163] United Nations "Combatting Discrimination Based on Sexual Orientation and Gender Identity" *Bureau Regional pour l'Afrique de l'Ouest* (07-03-2012) <http://www.westafrica.ohchr.org/Combatting-discrimination-based-on-sexual-orientation-and-gender-identity.html> (accessed 01-12-2018).

[164] Ramcharan *Fundamentals* 16.

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established by comparing potential interpretations of the Maputo Protocol. Treaty interpretation is an important tool in the development and implementation of international law. As argued by Kammerhofer and D'Aspremont:

> "Interpretation has a normative effect on the development of international law, given that legal systems are essentially rooted in the power of linguistic constructions, the possibility of semantic indeterminacy remains a reality".[165]

As set out under 1 4, the formal procedures for the interpretation of treaties are found in the VCLT.[166] Wallace and Martin-Ortega explain that the term 'treaty' indicates a multitude of instruments including, but not limited to, conventions, agreements and protocols. It is therefore evident that the Maputo Protocol is a treaty and thus open to interpretation.[167] Article 31 of the VCLT refers to the general rule of interpretation and article 31(1) sets out the basis for treaty interpretation:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

This article presents the three main approaches to treaty interpretation: the objective, subjective and teleological approaches.[168]

2 6 1 The objective and subjective approaches

As a point of departure, the objective approach, which is also known as the 'textual approach', refers to reading the ordinary meaning of the terms as found in the text of a treaty. As stated in article 31(1), this reading is done "in accordance with the ordinary meaning to be given to the terms". The subjective approach in comparison, which is also known as the 'intentions of the parties' approach' refers to a circumstantial reading of the terms found in a treaty where the focus is on establishing what the intentions of the drafters were at the time of drafting.[169] As stated in article 31(1), this reading of the terms is done "in their context".

Prior to the enactment of the VCLT, the International Law Commission introduced the Draft Convention on the Law of Treaties ("Draft Convention").[170] Article 19 of the Draft Convention dealt with the interpretation of treaties and can be seen as the

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165 J Kammerhoffer & J D'Aspremont *International Legal Positivism in a Post-Modern World* (2014) 317.
166 (adopted 23 May 1969, entered into force 27 January 1980) 1115 UNTS 331.
167 Wallace & Martin-Ortega *International Law* 268.
168 278.
169 GG Fitzmaurice "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) 28 *British Year Book of International Law* 1.
170 "Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session" (UN Doc. A/6309/Rev.I) in Yearbook of the International Law Commission 1966, vol. II (New York: UN, 1967) at 177-274(A/CN.4/SER. A/1966/Add. 1).

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precursor to articles 31 and 32 of the VCLT. It established that interpretation focuses on realising the general purpose that a treaty is intended to serve. Furthermore, the drafters emphasised that:

> "The historical background of the treaty, *trauvaux preparatoires*, the circumstance of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve".[171]

A defining attribute of the objective approach is that the meaning of the treaty is able to be derived plainly from the text of the treaty itself. This approach assumes that the words of the treaty are commonly understood terms that are unambiguous and which can also be read in plain context of the treaty by itself.[172] The legal scholars who endorse the objective approach usually do so with regard to the goal of legal certainty. However, if it is always assumed that treaties are self-sufficient and can withstand further scrutiny, there is a risk of unacknowledged bias being enforced.[173] The 'objectiveness' of an interpretation is often in actuality more attributable to the frequency of the use of a term than to the actual objectivity of said term. As suggested by Amin:

> "[T]he stance of the textual approach, namely that the words of the text are clear and contain only one true meaning is a theoretical flaw due to the fact that such an assumption [can] not apply to [all] human rights treaties, which are mainly formed in general terms".[174]

One possible risk of an objective interpretation of a treaty is that the results are restrictive and exclusionary. Upon application to the Maputo Protocol, such an interpretation might, for example, conflate the terms 'gender' and 'sex'. The specific implications of this in application to this research is discussed under 3 3 1.

Comparably, the underlying assumption of the subjective approach is that there is a common intention shared by all the parties to the treaty. Legal scholars in favour of this approach argue that the primary goal of treaty interpretation is to ascertain the intention of the ratified parties at the time of ratification and what the parties aimed to achieve with their codification at the time.[175] Thus, this approach creates complications when treaties are multilateral, as most current international human rights treaties are.

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171 Cambridge University Press "Draft Convention on the Law of Treaties" (1935) 29 *The American Journal of International Law* 661.
172 IM Sinclair *The Vienna Convention on the Law of Treaties* (1973) 75.
173 A Amin *A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and People's Rights* LLD dissertation, Stellenbosch University (2017) 26.
174 25.
175 Sinclair *The Vienna Convention on the Law of Treaties* (1973) 70.

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The subjective approach applied to a multilateral human rights treaty makes it difficult to establish any single common intention.[176] To interpret the Maputo Protocol through a subjective approach would be a multidimensional task, requiring consideration of the different State Parties and their respective subjective intentions.[177]

Although it is established that the Maputo Protocol was created to supplement the African Charter and recognise and provide for the specific rights of women in Africa by confirming the underlying principles of international human rights law within the African region, as seen by way of reservations entered into, some State Parties have already undermined the indisputable application of all articles in the Maputo Protocol.[178] Thus, full consensus between all State Parties regarding the treaty cannot be assumed.

2 6 2 The teleological approach

The third and final approach to treaty interpretation, the teleological approach, is also known as the 'purposive approach'. According to article 31(1), the reading of the treaty's terms is done in light of the treaty's object and purpose. Thus, this approach concentrates on providing a reading of the terms that best fulfil it's object and purpose.[179] As discussed by Fitzmaurice, the teleological approach initially gained popularity in application to multilateral conventions, particularly those of the "social, humanitarian and law-making type".[180] Accordingly, as noted under 1 4, this approach is arguably the most efficient in interpreting human rights treaties, such as the Maputo Protocol, as it considers the lived conditions of those affected.[181]

Compared to that of the objective and subjective approaches, the teleological approach doesn't only encourage that a treaty is to be interpreted through continuous reference to its object and purpose, but also that it can be supplemented and appended through such reference. Fitzmaurice argues that this allows for, at the risk

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176 Amin *A teleological approach to the interpretation of socio-economic rights* 24.
177 African Union "List of Countries which have signed, ratified, acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa" *Location* (07-09-2017) <https://au.int/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_rights_of_women_in_africa.pdf> (accessed 10-07-2018).
178 Article 1(d) of the VCLT defines a reservation as a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State".
179 Fitzmaurice (1951) *British Year Book of International Law* 2.
180 2.
181 Amin *A teleological approach to the interpretation of socio-economic rights* 31.

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of uncertainty, "gaps [to] be filled, corrections made, texts expanded [and] or supplemented".[182] Some legal scholars argue that this creates a risk for the "spilling over" of the treaty, where the object and purpose is manipulated to align to what the interpreters deem and/or desire it to mean. Although it is acknowledged to pose a potential risk of altering the treaty, Fitzmaurice elaborates that any alterations are only done when it is guaranteed that the relevant supplementation or appending is consistent and ensures total compliance and furtherance of the object and purpose.

Moreover, the teleological approach is essential to the application of the principles of effectiveness (*ut res magis valeat quam pereat*) and integration. As described by Fitzmaurice, the text of the treaty is:

> "[P]resumed to have been intended to have a definite force and effect, and should be interpreted so as to have such force and effect rather than so as not to have it, and so as to have the *fullest* value and effect consistent with their wording (so long as the meaning be not strained) and with the other parts of the text".[183]

Accordingly, a key benefit of a teleological interpretation is that it ensures that a treaty is applied with the object and purpose considered at all times and this ensures the most effective application and realisation of the treaty as designed. In the context of human rights protection this is clearly of significant value. The subsequent chapters will apply this method of interpretation to the Maputo Protocol in light of the fact that it was designed to ensure that "the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights".[184]

2 7 Conclusion

As established throughout this chapter, the terms 'sex' and 'gender' are not interchangeable. It can thus be concluded that although transgender women are not defined as women based on their biological sex, they can be considered women, based on their gender and gender identity. The application of post-modern intersectional feminist legal theory and queer legal theory furthermore confirm that transgender women are considered women from a legal perspective due to their gender identities being female.

Moreover, the Maputo Protocol explicitly describes women as persons of female gender, not of the female sex. Thus, as transgender women fall within this definition, they fall under the protection of the treaty. This assertion reflects an important

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[182] Fitzmaurice (1951) *British Year Book of International Law* 8.
[183] 8.
[184] Preamble to the Maputo Protocol.

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consideration for the subsequent discussions concerning the denial of these women's gender recognition and the violations of their human rights.

It was furthermore confirmed that the principle of universality is the foundational principle of international human rights law and that the rights to equality and non-discrimination are core in the application of international human rights law. A denial of legal recognition and human rights protection based on a heteronormative approach to human rights contradicts the principle of universality. As this thesis is focused on an application of international human rights law, these principles and rights are applied throughout the subsequent analysis. In the ensuing chapters, a teleological approach to treaty interpretation is used as the most effective method of interpretation to ensure that the Maputo Protocol fulfils its key object and purpose: protecting and providing for the human rights of African women.

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CHAPTER 3

THE RIGHT TO DIGNITY OF AFRICAN TRANSGENDER WOMEN

3 1 Introduction

It would be insufficient to present a discussion on individual human rights protection without a consideration of the scope and function of the right to dignity. Within international human rights law it is considered both an underlying principle as well as a right. This is an important consideration in light of the main research aim to assess the recognition and protection of African transgender women through a teleological interpretation of the Maputo Protocol.

3 2 The right to dignity

3 2 1 Dignity as an underlying value of international human rights law

The notion of dignity is regarded to be a key organising principle of international human rights law.[185] Derived from the Latin term *dignitas* (which translates into 'worthiness'), dignity refers to the recognition of the inherent worth and value of all human beings.[186] This recognition, as an organising principle of international human rights law, confirms its existence as an inalienable and universal right bestowed to all persons. Rudman argues that the principle of universality, as discussed under 2 5 1, is a "prerequisite to dignity" and accordingly incorporates all fundamental human rights.[187] This concept is reflected in a multitude of national constitutions and international instruments. As set out in article 1 of the UDHR:

> "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".[188]

Correspondingly, the preamble of the UN Charter declares its aim to:

> "[R]eaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".[189]

Both the ICCPR and the ICESCR begin with a confirmation of this principle as set out within the UN Charter, proclaiming that:

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185 T Lowenthal "The role of dignity in human rights theory: constituent or teleological?" (2015) 18 *Trinity College Law Review* 56.
186 R Steinmann "The Core Meaning of Human Dignity" (2016) 19 *PER/PELJ* 4.
187 Rudman (2019) *PER/PELJ* 9.
188 (adopted 10 December 1948) UNGA Res 217 A (III).
189 (adopted 24 October 1945) 1 UNTS XVI.

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> "[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[190]

CEDAW reiterates these statements and sets out in its preamble that "discrimination against women violates the principles of equality of rights and respect for human dignity".[191] Finally in the African human rights system, article 5 of the African Charter provides the point of departure that:

> "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status".

Furthermore, the African Commission in *Purohit and Moore v. The Gambia ("Purohit"),*[192] explained that:

> "Human dignity is an inherent basic right to which all human beings (…) are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right".[193]

The modern understanding of dignity was established by the German philosopher Immanuel Kant.[194] As part of his moral philosophy, he concluded that all individuals have an inherent dignity which must be respected and protected universally. He argued that all human beings bear an essential duality of dignity which includes the ability to reason and make decisions as well as a simultaneous burden to not infringe on the ability of others to do so.[195] This confirms the notion that dignity is bestowed to all individuals on the basis of them being human. It simultaneously creates an assurance of the equal respect of the dignity of others by those same individuals. The rights to equality and non-discrimination confirm this as both are bestowed on all individuals and create obligations for those individuals to simultaneously fulfil towards others.[196] Lowenthal argues that respecting the dignity of individuals prohibits states from treating them as objects.[197] Moreover, he argues that states have a duty to recognise that individuals are not a means to an end but are entitled to have their dignity respected and protected. This operates as a simultaneous acknowledgement

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190 (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
191 (adopted 18 December 1976, entered into force 3 September 1981) 1249 UNTS 13.
192 (2003) AHRLR 96 (AHCPR 2003).
193 Para 67.
194 Steinmann (2016) *PER/PELJ* 4. It is noted that notwithstanding Kant's decisive conceptual contribution to the notion of human dignity – recent studies have highlighted his own personal/racial bias and the contradiction present in some of his personal beliefs: see further L Allais "Kant's Racism" (2016) 45 *Philosophical Papers* 1-37.
195 Steinmann (2016) *PER/PELJ* 4.
196 14.
197 Lowenthal (2015) *Trinity College Law Review* 61.

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of their inherent humanity.[198] These ideas are reflected throughout international human rights law and is confirmed in the conceptualisation that human rights are fundamentally universal, inalienable and grounded in equality as well as non-discrimination, on *all* grounds.[199]

The right to dignity developed into a core notion following the Second World War, as part of the international focus on the preservation and extension of the rights of individuals. Steinmann argues that:

> "As a moral view, dignity represents the essence of what it means to be a human being; as a recognition of a human right, it legalises the notion that the essence of humanity must be recognised and respected in equal *quantum*".[200]

However, notwithstanding its frequent use as an underlying value of international human rights law, the term 'dignity' is not clearly defined in any international instrument. This makes the task of protecting it complex. Accordingly, examples of violations of the right to dignity are presented in this research to enable a better understanding of the subject matter of the respective violations. This in turn allows for an illustration of what requires protection which helps to demarcate what is incorporated when referring to the right to dignity.

Dignity as a concept has a broad scope. Vollmer argues that the right doesn't only refer to narrow violations of dignity but also includes "circumstances that result in the exploitation and the degradation of human beings".[201] Examples of such violations encompass a range of actions, from humiliation and defamation to physical harassment, rape, torture and murder. The definitive feature of a violation to the right, is stripping the 'inherent dignity' of the individual: the essence that entitles them to their basic respect as a human being.

The most extreme manifestation of this stripping of dignity occurs during the dehumanisation of individuals. Genocide, ethnic cleansings as well as crimes against humanity are all extreme consequences of such violations.[202] As an example, leading up to and during the Rwandan genocide, the Hutu led government described the Tutsi people as "cockroaches" instead of human beings.[203] Another example occurred

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198 Lowenthal (2015) *Trinity College Law Review* 65.
199 (adopted 10 December 1948) UNGA Res 217 A (III).
200 Steinmann (2016) *PER/PELJ* 2.
201 Vollmer *Queer Families* 241.
202 The international crimes of genocide and crimes against humanity are respectively defined in articles 6 and 7 of the Rome Statute of the International Criminal Court.
203 K Nhadiro "Dehumanisation: How Tutsis were reduced to cockroaches, snakes to be killed" (13-04-2014) *The New Times* <https://www.newtimes.co.rw/section/read/73836> (accessed 08-12-2018).

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during the Holocaust when the National Socialist German Workers' Party dehumanised Jewish people and perpetually referred to them as rats. The protection of the dignity of all individuals undoubtedly opposes any perception in which individuals are dehumanised and/or seen as 'non-human'.

Denial of gender recognition is a particular instance where the right to dignity is violated and is elaborated on under 3 2 2. This violation specifically targets transgender individuals as cisgender individuals are never denied their gender recognition. This is argued to be as a result of the fact that cisgender fall within the accepted gender binary and accordingly never have to justify their gender identity. States have a minimum core obligation to fulfil in order to ensure the right to dignity.[204] This is acknowledged in the aforementioned mentioned instruments, as part of the protection against the interference in an individual's enjoyment of a "dignified existence".[205] The African Commission describes a dignified existence to include the "progressive realisation of various of economic, social and cultural rights".[206] This description emphasises how the right to dignity is interlinked with other core human rights. Accordingly, the protection of the right to dignity preserves and upholds the enjoyment of other fundamental rights, including the rights to life and health, which are further discussed in chapters 4 and 5 respectively.

The acknowledgement of an individual's innate 'personhood' realises their right to dignity and recognises them as a protected legal subject.[207] Furthermore, such acknowledgement confirms the right to a dignified existence. It is argued in this research that in order to sufficiently protect an individual's dignified existence, particularly for marginalised groups such as African transgender women, a shift is required. This indicates less emphasis on negative state obligations (where the state must not infringe on an individual's dignity) to a greater focus on positive state obligations (in which the state is required to actively protect an individual's dignity). Such a shift is critical in the instances of violations to the dignity of individuals such as African transgender women, particularly as these violations exacerbate their vulnerability and often occur as a result of their non-normativity.

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[204] E Wicks "The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties" (2012) 12 *Human Rights Law Review* 205.
[205] Wicks (2012) *Human Rights Law Review* 206.
[206] African Commission 'General Comment No 3' on 'the African Charter on Human and Peoples' Rights: the right to life (art 4)' 57th Ordinary Session (November 2015) para 43.
[207] Lowenthal (2015) *Trinity College Law Review* 60.

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3 2 2 The right to gender recognition as an aspect of the right to dignity

As established, the recognition of human beings' inherent humanity and dignity, and as such their confirmation as legal subjects, is based on the acknowledgement of their innate personhood. Griffin argues that the recognition of this innate personhood is derived from a distinction between humans and animals. Because humans are able to form conceptions of a worthwhile life, have agency, autonomy and choice, he argues that they are entitled to their human rights and simultaneously have responsibilities bestowed on them to respect the human rights of others.[208] As mentioned previously, transgender individuals are often denied this inert recognition due to a rejection of their gender identities. As argued by Divan et al:

> "For trans[gender] people, their very recognition as human beings requires a guarantee of a composite of entitlements that others take for granted – core rights that recognize their legal personhood. As the Global Commission on HIV and the Law pointed out, 'In many countries from Mexico to Malaysia, by law or by practice, transgender persons are denied acknowledgement as legal persons. A basic part of the identity – gender - is unrecognized'. This recognition of their gender is core to having their inherent dignity respected".[209]

As discussed under 2 2, gender identity is an integral part of an individual's personality and understanding of self and is crucial in the protection of their inherent dignity. Stryker argues that transgender individuals are often perceived as "not-quite-human" because of their non-normative gender identities.[210] However, as pointed out by Currah, the key difference between transgender and cisgender (or non-transgender) individuals is that "non-transgender people have already achieved the legal recognition that many transgender people seek".[211] Because of this lack of recognition, in many states worldwide transgender individuals and their experiences remain invisible. A key contributing factor to this was seen under 2 6 2 where it was illustrated how some states argue that the inclusion of trans-specific legal recognition and protection would deviate from existing law to create a new set of human rights norms. These states further argue that these 'new' norms would undermine the religious and cultural beliefs of these states.[212] However, the provision of human rights is not dependant on an individual's gender identity. As clear in the universal rights of equality and non-discrimination: all human rights are bestowed on all human beings

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[208] Lowenthal (2015) *Trinity College Law Review* 60.
[209] V Divan, C Cortez, M Smelyanskaya & J Keatley "Transgender social inclusion and equality: a pivotal path to development" (2016) 19 *Journal of the International Aids Society* 3.
[210] Stryker *Transgender History* 8.
[211] Currah "The Transgender Rights Imaginary" in *Feminist and Queer Legal Theory* 254.
[212] Voss (2018) *Human Rights Review* 16.

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notwithstanding differences in aspects that make up their identities. Discrimination on the basis of gender identity is mostly justified through notions of relativism which, as was argued under 2 6 2, is a distorted application of international human rights law and a violation of these respective rights.

The use of the incorrect pronoun and/or dead naming transgender individuals when addressed is a common example of a violation of the right to gender recognition. This undermines their autonomy as well as their individuality and ultimately rejects their identity. Using the incorrect pronoun means that the transgender individual is addressed with the pronoun of their birth sex rather than the pronoun which correlates to their gender identity. Moreover, dead naming occurs when a transgender individual is addressed with the name they were given at birth instead of the name they have chosen for themselves.

On a national level, when the gender recognition of a transgender individual is denied, their appearance and the description in their identification documents will not correspond. This can create various barriers for them in terms of attaining formal employment, accessing health care and other basic social services as well as enjoying the protection of their basic human rights. As elaborated by Stryker:

> "Within modern bureaucratic society, many kinds of routine administrative procedures make life very difficult for people who cross the social boundaries of their birth-assigned genders. Birth certificates, school and medical records, professional credentials, passports, driver's licenses, and other such documents provide a composite portrait of each of us as a person with a particular gender, and when these records have noticeable discrepancies or omissions, all kinds of problems can result: inability to cross national borders, qualify for jobs, gain access to needed social services, and secure legal custody of one's children".[213]

It is a supposition of this research that when transgender individuals do not have access to basic services as well as the ability to participate in civil society, they are effectively dehumanised, and as long as these challenges are not recognised as valid human rights concerns, it is a violation of their right to dignity.[214] Legally speaking, the denial of recognition of an individual's gender, challenges their ability to be regarded as a legal subject. As discussed under 2 4, gender pluralism (the acceptance of all individuals as legal subjects regardless of their gender identity) confirms the inherent dignity and universal entitlements of human rights on the basis of non-discrimination.

As mentioned under 2 4 1, South Africa is the only State Party to the Maputo

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[213] Stryker *Transgender History* 8-9.
[214] Divan et al (2016) *Journal of the International Aids Society* 3.

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Protocol that has specific legislation which provides for transgender individuals.[215] Although other State Parties, such as Botswana and Kenya, have both recently made progress in allowing transgender individuals to have their gender identity recognised within their identity documents, these results only occurred through litigation which challenged the application of existing legislation.[216] In recent years, global attention has increased regarding gender recognition and the rights of transgender individuals. This has resulted in an increase in adoption of express gender identity recognition laws worldwide.[217] Whilst specific legislation is an improvement on a national level, it is not a guarantee, as is evident in South Africa, to stop victimisation and violence from occurring.[218] However, the operation and authority of treaties are of consequential value to guide international standards and to ensure accountability for state obligations to be fulfilled on a national level. This is why a teleological interpretation of the Maputo Protocol is argued to be so important for the progressive realisation and protection of African transgender women's human rights as it can directly inform the national obligations of the relevant State Parties.

3 2 3 The right to dignity in the Maputo Protocol

The right to dignity is set out in article 3 of the Maputo Protocol. However, article 1, the definitional article, does not provide a definition of what 'dignity' entails. Notwithstanding, article 3(1) begins with a provision for the general content of the right stating that:

> "Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights".

This article confirms two key principles. Firstly, the equality of the right to dignity, inferring that the intrinsic nature of this 'inherent dignity' is present in all women, by mere virtue of them being human. This is also confirmation for the universality of the right. Secondly, article 3 provides for the other rights of women to be recognised and protected as a *result* of their dignity. The use of the term 'recognition' is relevant to the argument as presented that transgender women are unable to enjoy their right to dignity as long as their gender identity is not recognised and that the exclusion of this

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[215] Alteration of Sexual Description and Sex Status Act.
[216] *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* (2014); *ND v Attorney General of Botswana & Another* (2017).
[217] ILGA: Z Chiam, S Duffy & GM González *Trans Legal Mapping Report 2017: Recognition before the law* (2017) 4.
[218] Coalition for African Lesbians & African Men for Sexual Health and Rights *Violence based on perceived or real sexual orientation and gender identity in Africa (*2013) 23-24.

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recognition only as a result of their non-normative gender identity is discrimination in and of itself.

The realisation of the right to dignity compliments the enjoyment of the right to bodily and mental integrity as well as to the overall protection of life; it further compliments the general position that all individuals should have the ability to be safe, healthy and alive. African transgender women are constantly challenged in their enjoyment of these rights. Vollmer argues that violations of the right to dignity prevent the ability of individuals to live a dignified existence.[219] Following this argument, it is put forward that protecting the right to dignity of African transgender women would aid in protecting many of their other human rights.

As noted, the Maputo Protocol defines women as "persons of female gender". Having discussed the relevance of this term (compared to the term sex); the phrasing of article 3(2) is also noteworthy as part of a teleological interpretation. It states that:

> "Every woman shall have the right to respect as a person and to the free development of her personality".

Because an individual's personality is the combination of characteristics and qualities that form their distinctive character and the personality and identity of individuals are inherently interrelated, it is argued that the gender identity of an individual is a fundamental aspect of their respective personality.

Articles 3(3) and 3(4) of the Maputo Protocol place a burden on State Parties to protect the dignity of African women. These articles emphasise that State Parties have a duty to prevent the exploitation and degradation of women as well as to specifically ensure their protection from sexual and verbal violence. This prohibition links dignity, not with an intangible, abstract concept, but rather a tangible and physical sense of being. It focuses on violations of women's bodies, emphasising their right to bodily integrity. Chapter 4 further illustrates this link in relation to the right to life, integrity and security of the person as contained in article 4 of the Maputo Protocol. The term 'exploitation' refers to the unfair treatment of an individual, where someone else benefits from their work and/or gains an unfair advantage from them. Often, exploitation is associated with economic gain through exploitative labour practices including slavery and human trafficking.[220] Other examples of exploitation are found

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[219] Vollmer *Queer Families* 244.
[220] OHCHR *Integrating A Gender Perspective into Human Rights Investigations: Guidance and Practice* (2018) 47.

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in instances of forced marriages and/or sexual exploitation. The core feature of exploitation is the coercive nature of the actions. The term 'degradation' refers to instances where an individual is undermined or demeaned, making them feel as if they have little or no value. It is an umbrella term which incorporates all manners of humiliation, as both degradation and humiliation undermine the self-worth, self-respect and self-esteem of an individual.[221]

Article 3(4) read alongside the definition of "violence against women" in article 1(j) of the Maputo Protocol result in a duty on State Parties to unequivocally promote the safety of African women. Although article 3(4) emphasises prevention of physical and sexual violence, article 1(j) has a wider protective scope. It defines "violence against women" as:

> "All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war".

A teleological interpretation of the Maputo Protocol where these articles are read together in light of the object and purpose informs the discussion under 4 3 1. Accordingly, this definition together with article 4(2)(c) challenges the heteronormative, cultural and religious justifications for violence against African transgender women; in consideration of the fact that as human beings they have inherent dignity. The African Commission in their *General Comment No 2* set out that:

> "The right to dignity enshrines the freedom to make personal decisions without interference from the State or non-State actors. The woman's right to make personal decisions involves taking into account or not the beliefs, traditions, values and cultural or religious practices, and the right to question or ignore them".[222]

Vollmer interprets this statement in the context of SOGI rights and argues that it provides three main ideas. Firstly, that as enjoyment of the right to dignity means that State Parties have an obligation to not interfere in the personal decisions of women, this could include that of gender identity expression. Secondly, that beliefs, traditions, values and/or cultural practices cannot be used as justification for the infringement of the right to dignity, as there are clear implications for violations to SOGI rights and the defences offered by states. Lastly, that if gender identity is confirmed as an integral part of an individual's personality, article 3 of the Maputo Protocol would specifically

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[221] Steinmann (2016) *PER/PELJ* 19.

[222] African Commission 'General Comment No 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' para 24.

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be able to advance the rights of women with non-normative SOGI, which includes transgender women.[223]

Accordingly, articles 1(k), 1(j), 3(1), 3(2) and 3(4) interpreted and read together in light of the object and purpose of the Maputo Protocol prevents the exclusion of transgender women from protection on the basis of their gender identity. Such a teleological interpretation promotes the protection of dignity of African transgender women.

3 3 The object and purpose of the Maputo Protocol

As mentioned under 1 1, the object and purpose of the Maputo Protocol is to ensure that African women are able to fully enjoy their human rights.[224] As contextualised by Muriithi:

> "[The] lack of clarity of human rights vis-à-vis the preservation of traditions, coupled with mass violations against African women, led to the women's movement demanding an African legal framework deriving from the African Charter that would spell out clearly the rights of women in Africa via-à-vis culture and religion and once and for all end the debate on whether African women were entitled to the protections guaranteed within the African Charter and other human rights instruments that African countries had ratified."[225]

Moreover, it is expressed in the preamble that the Maputo Protocol aims to promote the principle of gender equality as well as to eliminate all forms of discrimination and gender-based violence against women. This is noteworthy when undertaking a purposeful interpretation of the Maputo Protocol. However, even though all State Parties to the Maputo Protocol have ratified the African Charter as well as a host of other human rights instruments, "women in Africa still continue to be victims of discrimination and harmful practices".[226]

3 3 1 A conceptual confusion

The interchangeable use of the terms 'gender' and 'sex' within the Maputo Protocol is an example of a conflation of these significant terms. As discussed under 2 2, 'sex' and 'gender' are fundamentally distinct concepts. However, this discrepancy within the Maputo Protocol is not an isolated instance. It is reflective of the practice by some African governments to use the terms interchangeably, and thus conflate them. De

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[223] Vollmer *Queer Families* 244.
[224] Equality Now *Journey to Equality: 10 Years of the Protocol on the Rights of Women in Africa* (2013) 19.
[225] 43.
[226] Preamble of the Maputo Protocol.

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Vos criticises the Ugandan Anti Homosexuality Act[227] as an example of this conflation. De Vos explains how in the Act it defines:

> "[A] 'homosexual' [as] a person who engages or attempts to engage in same gender sexual activity and 'homosexuality' as same *gender* or same-sex sexual acts (section 1). Given the obviously construed nature of gender (as opposed to sex which is supposedly based on biological characteristics) it is unclear how a judge will be able to decide what the 'gender' of an accused person or their sexual partner is. The conceptual confusion – if one accepts that generally accepted categories of sex and gender are distinction (…) suggest an investment in the idea that sex and gender are both biologically determined and thus interchangeable". [228]

This is indicative of an ideological struggle occurring on the continent with regard to individuals with non-normative SOGI, which disproportionately affects African transgender women. Under 2 4 1 it was noted that homosexuality is still criminalised in many State Parties to the Maputo Protocol and that African transgender women are often persecuted on this basis when they are misidentified as homosexual men. Because such laws used 'sex' and 'gender' interchangeably, the distinction between homosexual men and transgender women is overlooked and the emphasis is placed on persecuting individuals who were born male and who do not comply with the heteronormative expectation of what a 'real' man is. This is representative of the harmful heteronormative culture present in a majority of these States Parties which operates as justification for human rights violations.[229]

In light of its object and purpose, a key article of the Maputo Protocol is article 1(f), which sets out that "discrimination against women" includes:

> "Any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life".

Thus, whilst the term 'gender' is the distinctive characteristic used to define a woman in article 1(k), discrimination against women in the Maputo Protocol is prohibited on the ground on 'sex'. This implies that the State Parties view the terms as interchangeable, which, as was explained in chapter 2, they are not.

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[227] On the 20th of December 2013, the Ugandan Constitutional Court found that there wasn't quorum in Parliament to enact the Anti-Homosexuality Act 2014 and as it was in contravention with Constitution of the Republic of Uganda 1995 and Rule 23 of the Parliamentary Rules of Procedure. Accordingly, it was made null and void on the technicalities; *Oloka-Onyango & 9 Others v Attorney-General* (2014) UGCC 14 20.

[228] P De Vos "The Limit(s) of the Law: Human rights and the emancipation of sexual minorities on the African continent" in D Higginbotham & V Collis-Buthelezi (eds) *Contested Intimacies: Sexuality, Gender and the Law in Africa* (2015) 8.

[229] Oloka-Onyango (2015) *AHJR* 50.

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The theories introduced in the previous chapter are useful in illustrating how the terms 'gender' and 'sex' affect the ability of transgender women to be recognised as 'women'. Post-modern intersectional feminist legal theory reveals that although it cannot be said that there is a universal nor essential experience of being a woman and that the presence of other factors of identity affect how a woman is treated in society and by the law, there is nonetheless validity in solidarity of an inclusive identity label for them. Through this there are no valid grounds for exclusion, including that of gender identity.

Moreover, queer legal theory illustrates that markers of identity are socially constructed and fluid.[230] It undermines the heteronormative and binary legal constraints expected of individuals in order to attain citizenship, recognition as legal subjects and the acknowledgment of their inherent dignity. This intersection of sex and gender within article 1 of the Maputo Protocol, is reflective of cultural constraints and argued to be culturally relativist. If read teleologically and together, in order to uphold the object and purpose of the Maputo Protocol, this would require the narrow reference to discrimination on the basis of sex to extend to that of gender (including gender identity) discrimination.

As argued under 2 6 2, it is crucial to consider the overall scope and spirit when interpreting a human rights treaty. To best give effect to the treaty, the conduct of the State Parties must align to the object and purpose. On this basis, in light of the scope and spirit of the Maputo Protocol to protect women, and in considering the basic notions of human rights such as dignity, equality and non-discrimination, these terms must be read to best give effect to an interpretation which would protect African transgender women.

3 3 2 The right to non-discrimination

The right to non-discrimination as discussed under 2 5 1 is a core right within international human rights law. It is expressed in two articles of the Maputo Protocol. Firstly, in article 1(j) as discussed previously and secondly in article 2 ("the elimination of discrimination against women"), which is the first substantive article of the Maputo Protocol. Accordingly, its significance cannot be overlooked as it acts as a precursor for the rest of the Maputo Protocol. Further, it is complementary to the fundamental

[230] Chamallas *Introduction to Feminist Legal Theory* 218.

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concepts underlying international human rights law as evident in its general prohibition in article 2(1) that:

> "States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures".

This prohibition is followed by five subsections that specify courses of action through which State Parties must prevent discrimination against women. The phrasing of article 2(2) is noteworthy as it effectively acknowledges the contradictory nature of the violent persecution and discriminatory culture of national governments in contrast to the values and obligations enshrined in the Maputo Protocol. Article 2(2) stipulates that:

> "States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men".

This article implicates the culture of heteronormativity which, as discussed under 2 2, has a detrimental effect on the rights and lives of individuals with non-normative gender identities. Article 2(2) can be used to justify the eradication of heteronormative practices, including those which persecute African transgender women. Article 2(2) is comparable to article 5(a) of CEDAW as they are almost identically phrased. This is useful in consideration of the argument made by Holtmaat and Post that article 5(a) could be used as justification for a trans-inclusive application of CEDAW.[231] Article 5(a) reads that:

> "States Parties shall take all appropriate measures: to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

Holtmaat and Post assess the value of CEDAW in relation to SOGI minorities with a focus on the function of article 5(a). They argue that even though discrimination against women is emphasised to be on the basis of 'sex' (identical to that in the Maputo Protocol), a teleological interpretation of CEDAW could potentially:

> "[R]elate to women's sex, sexuality, gender roles and gender identity [which] can further be underscored when the overall objectives of the Convention are taken into account".[232]

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[231] R Holtmaat & P Post "Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?" (2015) 33 *Nordic Journal of Human Rights* 319.

[232] Holtmaat & Post (2015) *Nordic Journal of Human Rights* 324.

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In their argument, they refer to the CEDAW Committee's General Recommendation No 28 which advocates for an intersectional and more inclusive interpretation of CEDAW. Moreover, they recognise the CEDAW Committee's acknowledgement within their Concluding Observations on Venezuela, Albania and Georgia of the violence against women with non-normative SOGI.[233] However, Holtmaat and Post argue that the CEDAW Committee should investigate further and progressively develop the link between gender stereotyping and discrimination against individuals with non-normative SOGI. They suggest that the CEDAW Committee create a General Recommendation on article 5(a) which focuses on the relationship between gender stereotypes, traditional gender roles and the oppression of individuals with non-normative SOGI, explicitly including transgender individuals.[234] They conclude their argument by contextualising that non-discrimination can operate to create a "prism" to protect the human rights of individuals with non-normative SOGI.

The right to non-discrimination protects individuals based on all characteristics and operates from a non-exhaustive list. As per the discussion under 2 5 1, because an individual's gender identity is an "innate or immutable aspect of personal identity" fundamentally linked to their dignity, it is confirmed that discrimination based on gender identity is a violation of the fundamental international law principle of non-discrimination.[235]

Holtmaat and Post's analysis of article 5(a) of CEDAW is valuable for a comparative analysis of article 2(2) of the Maputo Protocol as it promotes a teleological interpretation of the right to non-discrimination for African transgender women. The recommendations made by them are relevant in the African human rights system as it is apparent that a substantial share of the discrimination and violence perpetuated against these women is based on gender stereotypes which are influenced by religious and cultural convictions of communities and governments. Thus, article 2(2) of the Maputo Protocol, if read teleologically and inclusively, could protect African transgender women. It can further illustrate how the exclusion of human rights protection on the basis of gender identity is a direct violation of the fundamental values embodied in the Maputo Protocol.

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[233] Holtmaat & Post (2015) *Nordic Journal of Human Rights* 327-328.
[234] 330-331.
[235] 332.

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Accordingly, this thesis argues that it is arbitrary to differentiate between a transgender and a cisgender woman in order to grant human rights protection and that such a differentiation discriminates against them on the basis of their gender identity. Furthermore, such a distinction is arbitrary as some transgender women are more successfully able to 'pass' as women in their gender expression and are therefore more readily accepted in society as women. Often, these women are only 'outed' due to inconsistencies within their documentation as discussed under 3 2 2. In realising the right to non-discrimination linked with the right to dignity, the explicit references made in article 2(2) to harmful cultural and traditional practices, superiority of either sexes as well as stereotyped roles for either genders are worth acknowledging and assessing, specifically in the African human rights system. The Maputo Protocol acknowledges the negative impacts of the heteronormative cultures present in many State Parties, which if unchallenged, are detrimental to the protection of human rights. This is further discussed under 4 3 2.

3 4 The right to dignity of African transgender women

3 4 1 Transgender experiences in the African human rights system

As briefly mentioned in chapter 2, the position of African transgender women in African society is precarious and sparsely documented.[236] However, with regard to the recognition of gender identity rights in the African human rights system, the work of the African Commission is significant. In 2014, the African Commission, at its 55th Ordinary Session in Luanda, Angola, concluded Resolution 275 entitled "Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity". This Resolution states that the African Commission is aware and alarmed at the fact that violence, discrimination and harassment continue to be committed against individuals in many parts of Africa because of their actual or implied SOGI.[237] Further, the African Commission acknowledged that such violence includes 'corrective' rape, assaults, torture, murder, arbitrary arrests, detention, executions, forced disappearances, extortion as well as blackmail. Even though it is not a binding instrument per se,

[236] GA Jobson, LB Theron, JK Kaggwa & HJ Kim "Transgender in Africa: Invisible, inaccessible, or ignored?" (2012) 9 *SAHARA-J: Journal of Social Aspects of HIV/AIDS* 161.
[237] Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, 55th Ordinary Session from 28 April to 12 May 2014.

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Resolution 275 is noteworthy as an explicit recognition of violations of SOGI rights within the African regional human rights system. It is useful in light of the preamble of the Maputo Protocol which states that any other related "Resolutions, Declarations, Recommendations, Decisions, Conventions (…) aimed at eliminating all forms of discrimination and at promoting equality between women and men" must be considered. Accordingly, reading Resolution 275 together with the Maputo Protocol gives content and context to the rights and provides a basis for the condemnation of the violence committed against transgender women by State Parties. This is relevant for the discussion which ensues under 4 3 2.

In 2018, the Centre for Human Rights published 'Implementation Guidelines' for Resolution 275.[238] Whilst praising the progress of the African Commission, the Centre noted that regardless of Resolution 275, individuals with non-normative SOGI in Africa continue to be victims of violence and harassment.[239] Within the guidelines, the Centre argued that "the fight to curb violence against persons based on their real or imputed sexual orientation or gender identity is strengthened by two binding treaties that apply at the regional level".[240] Referring to the African Charter and Maputo Protocol, they argued that the measures within both documents which grant the protection of "the rights to life, dignity and physical integrity", as well as "the guarantee against cruel, degrading of inhuman treatment (…) requires state parties to take specific measures to combat violence against women regardless of their (…) gender identity".[241] This argument supports a teleological interpretation of the Maputo Protocol and is relevant to consider in light of the discussion below, highlighting the ongoing violations against the dignity of African transgender women.

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238 University of Pretoria, Centre for Human Rights & AMSHeR *Resolution 275: What it means for State and Non-state actors in Africa* (2018).

239 S Khumalo "The Centre for Human Rights Launches Resolution 275 Guidelines at the 63rd Session of the African Commission on Human and Peoples' Rights" (31-10-2018) *University of Pretoria News* <https://www.up.ac.za/en/faculty-of-law/news/post_2730847-the-centre-for-human-rights-launches-resolution-275-guidelines-at-the-63rd-session-of-the-african-commission-on-human-and-peoples-rights online publication> (accessed 14-11-2018).

240 University of Pretoria et al *Resolution 275: What it means for State and Non-state actors in Africa* (2018) 1.

241 University of Pretoria et al *Resolution 275: What it means for State and Non-state actors in Africa* (2018) 1.

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3 4 2 Violations of the dignity of African transgender women

The vulnerability of African transgender women is exacerbated when they are victims of violence, rape and harassment.[242] Their experiences are multifaceted when considering the range of marginalisation these women frequently face, from overt victimisation and violence to more nuanced stigma, harassment and humiliation. A report released in late 2018 by the NGO Sexual Minorities Uganda ("SMUG") illustrates treatment of transgender women in Uganda. The report detailed:

> "[R]ecently, Ariana, a transgender woman, was arrested (…) and taken to Katwe police station, where she was forced to strip naked. Photographers and media came to the station and subsequently published her photo, reminiscent of past outing campaigns in Uganda. Three other women, Sweet Love, Samali, and Shani were attacked by mobs between June and August, with no repercussions to the perpetrators".[243]

This excerpt illustrates several violations of the dignity of these women. The forced stripping, degrading treatment, publication of humiliating photos as well as the lack of response to the violent attacks all exemplify a disregard to the inherent human value and dignity of these women and the basic respect they are entitled to as human beings, but are subsequently denied because they are transgender. The fact that these instances occurred and were exacerbated by police officers who are state officials, is noteworthy when assessing the due diligence of State Parties. Although states cannot always be held accountable for the actions of individual officials, due diligence, as described by the Independent Expert on SOGI "requires states to protect those at particular risk of violence and discrimination and to take measures to understand and eliminate cultural stigmatization and other social causes of violence and discrimination".[244]

Another recent example of undignified treatment of transgender women, albeit different in its extent and location, can be found in a news article published in the Mail & Guardian in 2018.[245] The article detailed two young South African transgender women and their experiences attending college. After being explicitly told that they

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[242] E Ngigi & P Mwarangu "My life as a transgender in Kenya — Letoya Johnstone" (24-11-2018) *The Star* <https://www.the-star.co.ke/news/2018/11/24/my-life-as-a-transgender-in-kenya-letoya-johnstone_c1851304> (accessed 19-01-2019).

[243] Admin "Ugandans Urged to Tackle Transphobia by Protecting the Trans Community In Uganda" (4-12-2018) *Sexual Minorities Uganda* <https://sexualminoritiesuganda.com/2772-2/> (accessed 19-01-2019).

[244] HRC 'Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 45th Session (24 June - 12 July 2019) para 13.

[245] C Collison "Trans toilet access still a struggle" (22-06-2018) *Mail & Guardian* <https://mg.co.za/article/2018-06-22-00-trans-toilet-access-still-a-struggle> (accessed 19-01-2019).

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had to use the male bathroom, both suffered continuous harassment and humiliation which included being filmed whilst using the toilet and having male students taunt them and show them their genitals. A report referenced in the article referred to similar experiences of young adult transgender students throughout South Africa and particularly how the treatment of them has made using the bathroom a traumatic event.[246] The ability to use a public bathroom without interference and/or harassment is a logical application of having one's dignity respected.[247] This simple action incorporates having one's right to privacy and bodily integrity respected and yet it is a frequent violation against transgender individuals. In 2014 a Zimbabwean transgender woman, Ricky Nathanson, was arrested for using the female bathroom. She later filed an application at the High Court demanding compensation for the unlawful arrest and in her summons detailed how she was "publically arrested by six police officers in riot gear".[248]

As mentioned under 3 2 2, a majority of African transgender women encounter barriers in having their identification documents match their gender identity instead of their biological sex. This creates an unavoidable burden that affects these women in areas of their every daily life, including access to employment, healthcare and a range of other social services.[249] Access to healthcare is further discussed in detail in chapter 5. Moreover, as a result of these administrative hurdles, many African transgender women are unable to retain formal employment.[250] Due to this, a considerable number of transgender women end up earning an income through sex work; an activity that is still criminalised in a majority of State Parties to the Maputo Protocol. Even in states that do not criminalise sex work, social stigma against sex workers remains high; the consequences of which are discussed in chapter 4 and 5 respectively.[251] In addition to the criminalisation, the inherent unequal power dynamic between a client and sex worker combined with the urgency for these women to make a living, increases the

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[246] Collison "Trans toilet access still a struggle" *Mail & Guardian*.
[247] C May, B Valentine & Gender Dynamix "Access to Toilets: A Right Denied" (2017) *Legal Resources Centre* <http://resources.lrc.org.za/access-to-toilets-a-right-denied/> (accessed 20-01-2019).
[248] Newsday "High Court judge to give judgement in transgender activist case" (31-07-2017) *Newsday* <https://www.newsday.co.zw/2017/07/high-court-judge-give-judgment-transgender-activist-case/> (accessed 20-01-2019).
[249] Thomas Reuters Foundation "New masculinities: meet Uganda's transgender men fighting sexism" (10-05-2018) *The East African* <https://www.theeastafrican.co.ke/news/ea/Uganda-transgender-men-fighting-sexism/4552908-4554614-p54e0c/index.html> (accessed 24-11-2018).
[250] C Mgbako & LA Smith "Sex Work and Human Rights in Africa" (2011) 22 *Fordham International Law Journal* 1181-1185.
[251] Mgbako & Smith (2011) *Fordham International Law Journal* 1209.

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number of transgender women that engage in high-risk sexual behaviour.[252] This in turn increases their vulnerability to contracting HIV/AIDS, as well as being victims to physical violence with no means of recourse.[253] The intersection of their victimisation by police officers is dealt with under 4 4 3 whereas their vulnerability to HIV/AIDS is examined under 5 4 3.

3 5 Conclusion

The notion of dignity within the Maputo Protocol is an inherent human value and an established right within international human rights law. Gender recognition forms an inherent aspect of the right to dignity due to the fact that it represents an essential part of an individual's personality. Recognition of an individual's gender fundamentally supports and justifies respect for an individual's innate personhood and upholds their right to dignity. A denial of gender recognition is one of the innate forces furthering the discrimination and persecution against African transgender women. The analysis in this chapter uncovered and assessed the prevalence as well as the causes of a conceptual confusion of 'sex' and 'gender' in the Maputo Protocol as well as within the African human rights system. The right to non-discrimination, as introduced in chapter 2, was also expanded on considering the link between protecting the dignity of individuals and discrimination based on gender identity which unfairly affects transgender women. Finally, the experience of being an African transgender woman and having their dignity protected was considered in light of Resolution 275. Violations against their dignity was illustrated to show the gap between the protection provided in the Maputo Protocol compared to the undignified lived experiences of African transgender women.

[252] S Winter, M Diamond, J Green, D Karasic, T Reed, S Whittle & K Wylie "Transgender people: health at the margins of society" (2016) 388 *Lancet* 394.
[253] Mgbako & Smith (2011) *Fordham International Law Journal* 1178.

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CHAPTER 4

THE RIGHT TO LIFE, INTEGRITY AND SECURITY OF AFRICAN TRANSGENDER WOMEN

4 1 Introduction

The right to life is arguably the most fundamental human right as when it is violated, there can be no enjoyment of any other human rights.[254] Moreover, the right to life is imperative and comprehensive as many other human rights can be read into it.[255] As the primary aim of this research is to analyse whether African transgender women are recognised and protected as 'women' under the Maputo Protocol, this chapter seeks to assess what such protection would entail under article 4 of the Maputo Protocol; protecting the rights to life, integrity and security. The discussion proceeds from the conclusion, as reached in chapter 2, that all human rights are universal and equally provided for based on the prohibition of discrimination. Furthermore, as argued in chapter 3, discrimination based on gender identity is prohibited under international human rights law. Thus, this chapter considers violations of the rights to life, integrity and security of African transgender women, i.e. persecution based on gender identity, in light of their rights to dignity, equality and non-discrimination.

4 2 Life, integrity and security as interwoven concepts with dignity

The enjoyment of 'life' has different implications depending on the context. However, for the purposes of this research, references to 'life' indicate the physical existence of human beings. Accordingly, an individual's life is the time they spend alive after their birth and before their death. The right to life, as provided for in a multitude of international instruments is, as mentioned, arguably the most fundamental human right.[256] As described by Herndll:

> "Of all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, from which the latter obtain their raison d'etre and must take their lead".[257]

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[254] BG Ramcharan "The Concept and Dimensions of the Right to Life" in BG Ramcharan (ed) *The Right to Life in International Law* (1985) 7.
[255] Ramcharan "The Concept and Dimensions of the Right to Life" in *The Right to Life* 6.
[256] J Rehman *International Human Rights Law: A Practical Approach* (2003) 303.
[257] K Herndll "Foreword" in BG Ramcharan (ed) *The Right to Life in International Law* (1985) xi.

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The right to life is based on the moral principle that all individuals have the right to live and not be deprived of their life by another human being.[258] This imposes a corresponding duty on every individual to respect the lives of others.[259] Notwithstanding that this description provides a framework in which to conceptualise the right, it fails to encapsulate that threats to human life are not always solely by other individuals. Often the actions of states as well as environmental factors can equally end an individual's life.[260] Furthermore, a guarantee to be alive and the notion that the absence of death equates the enjoyment of life are insufficient realisations of this right to life.[261] This claim is discussed further under 4 2 1.

Similar to 'life', the notions of 'integrity' and 'security' have multiple implications depending on the context in which they are understood and applied. The right to integrity for an individual indicates that they have a right to a sense of stability and autonomy in their physical, emotional and mental state of being. As is further discussed under 5 2 1, the protection of bodily integrity is an inherent aspect of the realisation of the right to health and is an example of how dignity interlinks with the realisation of a multitude of human rights, such as the right to integrity.[262] Within international human rights law, the notion of 'security' is pertinent to the guarantee that all individuals are free from danger, threats and/or violence to their bodies and minds.[263] In *General Comment No 35* the HRC state that this security is guaranteed to all individuals and they explicitly include transgender individuals in their comment.[264]

The principle of universality read with the rights to dignity, equality and non-discrimination guarantee the protection of the basic human rights of all individuals on the basis that they are human; this theoretical foundation is at the heart of every human rights instrument.[265] Moreover, the concepts of life, integrity and security of an individual as reconciled with the notion of human dignity are foundational to the

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[258] Ramcharan "The Concept and Dimensions of the Right to Life" in *The Right to Life* 4.
[259] DD Nsereko "Arbitrary deprivation of life: controls on permissible deprivations" in BG Ramcharan (ed) *The Right to Life in International Law* (1985) 245.
[260] African Commission 'General Comment No 3' on 'the African Charter on Human and Peoples' Rights: the right to life (art 4)' 57th Ordinary Session (November 2015) para 41.
[261] Wicks (2012) *HRLR* 218.
[262] S Heidari "Sexual rights and bodily integrity as human rights" (2015) 23 *Reproductive Health Matters* 2.
[263] HRC 'General Comment No 35' on 'Article 9 (Liberty and security of the person)' 112th Session (7-31 October 2014) para 3.
[264] Para 3.
[265] Coalition for African Lesbians & African Men for Sexual Health and Rights *Violence based on perceived or real sexual orientation and gender identity in Africa (*2013) vii.

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conceptualisation of these human rights. Accordingly, as argued throughout this thesis, in order to most effectively interpret a human right instrument such as the Maputo Protocol, the teleological approach to treaty interpretation is used; and this framework as discussed is considered throughout the interpretation process.

4 2 1 The right to life

As the protection of human life is a key concern of the international community, the right to life is contained in most human rights treaties.[266] This right is inalienable and cannot be withdrawn, surrendered or transferred to another individual.[267] As described by Kabaalioglu:

> "[I]t is an essential right and all the other rights derive from it; if a person is deprived of his right to life, all other human rights will be meaningless (…) indeed, if there is no right to life, there would be no meaning in having other human rights".[268]

The right to life is furthermore a *jus cogens* norm*:* an imperative norm within international law which is recognised by the entire international community and which cannot be derogated from.[269] Consequently, all states have an inherent obligation to protect the right to life of all individuals regardless of whether they are bound by a specific treaty or not.[270] As argued under 2 6, notwithstanding this broad obligation, the codification of the right within human rights treaties is beneficial in order to guarantee it's protection; as codified rights and obligations are more effective in holding states accountable due to the fact that treaties are binding in force.[271]

As a point of departure for the codification of the right to life, article 3 of the UDHR states that:

> "Everyone has the right to life, liberty and security of the person".

In confirmation of this, article 6 of the ICCPR stipulates that:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

The HRC in *General Comment No 36* emphasise its significance and argue that:

> "The right to life has crucial importance both for individuals and for society as a whole. It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right whose effective protection is the prerequisite for the

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266 Article 3 of the UDHR, article 2 of the European Covenant on Human Rights, article 6 of the ICCPR as well as article 4 of the African Charter.
267 Nsereko "Arbitrary deprivation of life" in *The Right to Life* 245.
268 Kabaalioglu "The obligations to 'respect' and to 'ensure' the right to life" in *The Right to Life* 160.
269 Rehman *International Human Rights Law* 22-23.
270 African Commission 'General Comment No 3' on 'the African Charter on Human and Peoples' Rights: the right to life (art 4)' 57th Ordinary Session (November 2015) para 5.
271 Article 26 of the VCLT.

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> enjoyment of all other human rights and whose content can be informed by other human rights".[272]

Within the African human rights system, article 4 of the African Charter states that:

> "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right".

The description of being 'inviolable' infers incontestable respect for all individuals. Accordingly, this description of human beings as 'inviolable' confirms the notion of dignity as discussed under 3 2 1. Because of the worthiness and value of all human beings (i.e. their inherent dignity), their fundamental human rights are protected, which includes their right to life. As stated in *General Comment No 36,* the right to life must not be interpreted narrowly but rather ensure that individuals "enjoy a life with dignity".[273] Taking note of this together with the 'inviolability' of all individuals also advocates for the protection of their security and integrity.

Although the right to life is the most fundamental human right, it is not absolute.[274] The prohibition against the deprivation of life is also not absolute but rather outlaws "arbitrary deprivations".[275] Nsereko argues that this is in recognition of a set of circumstances in which it may be legitimate to sacrifice an individual's life in the pursuit of protecting "other compelling state interests".[276] The conflict between the stipulation of the term "arbitrary" and the inalienable nature of the right to life, however, is inconclusive. Boyle argues that the concept invokes a general standard, which can function simultaneously as a limitation of the right as well as a pledge opposing "unjustified killing".[277] The HRC sets out that the deprivation of life is arbitrary if it is inconsistent with international law and/or domestic law, and that arbitrariness as a notion includes "elements of inappropriateness, injustice, lack of predictability, and due process of the law".[278]

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[272] HRC 'General Comment No 36' on 'article 6 of the ICCPR, on the right to life' 124th Session (8 October to 2 November 2018) para 2.
[273] HRC 'General Comment No 36' on 'article 6 of the ICCPR, on the right to life' 124th Session (8 October to 2 November 2018) para 3.
[274] Para 10.
[275] Article 6(1) ICCPR; African Commission 'General Comment No 3' on 'the African Charter on Human and Peoples' Rights: the right to life (art 4)' 57th Ordinary Session (November 2015) para 12.
[276] Nsereko "Arbitrary deprivation of life" in *The Right to Life* 247.
[277] CK Boyle "The concept of arbitrary deprivation of life" in BG Ramcharan (ed) *The Right to Life in International Law* (1985) 221.
[278] HRC 'General Comment No 36' on 'article 6 of the ICCPR, on the right to life' 124th Session (8 October to 2 November 2018) para 12.

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Whilst currently included in many human rights instruments, the term "arbitrarily deprived" was first used in the ICCPR.[279] Boyle argues that this was done as an acknowledgement that even though killings might occur, an established *numerus clausus* of exceptions could help reduce the frequency of such occurrences. It is noteworthy that the ICCPR was drafted in a time when the death penalty was still common in many state's national legislation. However, this threshold has changed with the evolving values of the international community. As set out in *General Comment No 36*:

> "States parties must respect the right to life and have the duty to refrain from engaging in conduct resulting in arbitrary deprivations of life. States parties must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities, whose conduct is not attributable to the State. The obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life".[280]

The right to life incorporates the protection of an individual to be able to live and not be subjected to death. However, as noted under 4 2, this is complicated in international human rights law as threats to the lives of individuals are not limited to the threat or result of violence by other individuals only. Moreover, the absence of death is contended to be insufficient in the encompassment of 'life' and thus a full realisation of the right to life.[281] Wicks argues that in order to define 'life' within the right to life, the incorporation of dignity, as discussed under 3 2 1, is mandatory. She furthermore argues that such incorporation enables the integration of "basic economic and social needs into the ambit of a right to life, by extending the conditions necessary for life to continue beyond a mere absence of death".[282]

Accordingly, the protection of the right to life incorporates more than just protection against death which is an important consideration for the discussion which takes place later under 4 4 3. As set out, states have both positive and negative obligations to protect the rights of all individuals.[283] As described under 3 2 1, negative obligations require non-interference of states in the enjoyment of individuals' rights. Positive obligations, however, require states to actively provide for the protection and enjoyment of individuals' rights. In consideration of the right to life Wicks argues that

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[279] Boyle "The concept of arbitrary deprivation of life" in *The Right to Life* 222.
[280] HRC 'General Comment No 36' on 'article 6 of the ICCPR, on the right to life' 124th Session (8 October to 2 November 2018) para 7.
[281] Wicks (2012) *HRLR* 204.
[282] 216.
[283] Ramcharan "The Concept and Dimensions of the Right to Life" in *The Right to Life* 8-9.

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states must "not only refrain from killing but also (…) govern in a manner that seeks to preserve human life whenever reasonably possible".[284] The HRC, in *General Comment No 36*, mandate that the duty on states to protect the right to life includes an obligation to adopt appropriate laws and/or other measures that ensure the protection of life from all "reasonably foreseeable threats", including those which emanate from private persons and/or private entities.[285] This confirms their due diligence, as discussed under 3 4 2.

In all the respective articles of international instruments where the right to life is set out, positive state obligations are identifiable. This includes article 4(1) of the Maputo Protocol which is discussed under 4 3 1. In terms of achieving a balance between positive and negative state obligations, Wicks concludes that:

> "A state cannot always save a life but it can be required to always seek to act, and to refrain from acting, in a manner that accords the appropriate respect for the dignity inherent in all human life".[286]

Accordingly, whilst State Parties cannot be held accountable for every transgender woman who is deprived of their right to life, there is an argument based on this that they have a duty to not be the cause of the deprivation. *General Comment No 36* sets out that:

> "The duty to protect the right to life requires States parties to take special measure of protection towards persons in situation of vulnerability whose lives have been placed at particular risks because of specific threats or pre-existing patterns of violence. These include (…) lesbian, gay, bisexual, transgender and intersex (LGBTI) persons".[287]

Furthermore, this comment is noteworthy for the discussion which ensues under 4 3 2 and 4 4 2 with regard to the patterns and causes of violence which particularly affect African transgender women.

4 2 2 The right to integrity and security of the person

The rights to integrity and security are intertwined and interdependent with the right to life. Rehman argues that these rights form an integral aspect of the human rights corpus.[288] It was illustrated that the right to life in article 3 of the UDHR includes the right to security and moreover, the right to life in article 4 of the African Charter

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[284] Wicks (2012) *HRLR* 203.
[285] HRC 'General Comment No 36' on 'article 6 of the ICCPR, on the right to life' 124th Session (8 October to 2 November 2018) para 18.
[286] Wicks (2012) *HRLR* 218.
[287] HRC 'General Comment No 36' on 'article 6 of the ICCPR, on the right to life' 124th Session (8 October to 2 November 2018) para 23.
[288] Rehman *International Human Rights Law* 243.

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incorporates the right to integrity. However, some human rights treaties include these rights in their own separate articles. Article 9 of the ICCPR sets out that:

> "Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty expect on such grounds and in accordance with such procedure as are established by law".

Article 6 of the African Charter similarly states that:

> "Every individual shall have the right to liberty and security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

Accordingly, sometimes the rights to security and integrity are codified as part of the right to life and sometimes they are set out as their own separate rights.[289] Another noteworthy aspect of the phrasing of these rights is that the right to security is often attached to the right to liberty. This is a useful consideration when teleologically interpreting the right as the right to liberty concerns confinement of individuals, often in the case of arrest and detention.[290]

The right to security infers both positive and negative obligations on states. The negative obligations require states to refrain from persecuting or endangering individuals whereas the positive obligations require states to create and implement measures that ensure the respect for the rights of these individuals and consequently create settings in which they are protected. The HRC has noted that states have a general duty to protect *all* individuals from "foreseeable threats to life or bodily integrity proceeding from any governmental or private actors".[291] Considering this notion of security, as applicable to individuals with non-normative SOGI worldwide, the OHCHR has recognised that:

> "Homophobic and transphobic violence has been reported in all regions of the world [and] ranges from aggressive, sustained psychological bullying to physical assault, torture, kidnapping and targeted killings. Sexual violence has also been widely reported, including so-called "corrective" or "punitive" rape".[292]

This violence directly threatens the enjoyment of African transgender women's rights to life, integrity and security which is further illustrated below under 4 3 2, 4 4 2 and 4 4 3.

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[289] Integrity is found separate in article 5 of the European Convention on Human Rights as well as article 5 of the American Convention on Human Rights.
[290] HRC 'General Comment No 35' on 'Article 9 (Liberty and security of the person)' 112th Session (7-31 October 2014) para 40.
[291] Para 9.
[292] OHCHR *Free & Equal United Nations for LGBT Equality Fact Sheet: Homophobic and transphobic violence* (2017) 1.

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Moreover, the link between the realisation of the rights to integrity and security and the direct advancement of a dignified existence underlines a standard of living in which the basic economic and social rights of all individuals are guaranteed. The aforementioned presence of the mental and physical element that forms part of both rights is noteworthy when drawing attention to violations against the bodily integrity and security of African transgender women. Whilst it is not argued that physical violations are more severe than mental ones, they are easier to identity and quantify. Furthermore, such violations are noted to overlap as transgressions against the protection against violence, torture and inhumane or degrading treatment. In contrast, the decay of an individual's mental wellbeing, and thus their mental integrity and/or security, is difficult to assess. The consequences of these violations for African transgender women is further discussed under 4 4 2 and also informs the discussion that proceeds under 5 4 which includes an illustration of the high rates of depression and suicide amongst African transgender women.

The link between the integrity, security and dignity of an individual confirms that a narrow interpretation of the right to life, where the avoidance of death is unduly emphasised, neglects to reflect the variety of experiences related to the term 'life'.[293] This is also contained in the concept of a 'dignified existence' as discussed under 3 2 1. Accordingly, this implies that individuals should be protected from being condemned into poverty stricken, abusive and/or violent environments. Because the rights were first drafted in the UDHR, their originally narrow scope and application have since developed and expanded. Initially, the right to security focused on regulating unlawful imprisonment and prohibiting torture. However, current interpretations of the right include protecting bodily autonomy.[294] The right to integrity likewise prompts protection of social and health rights.[295] These developments confirm a teleological interpretation of these rights, as it ensures the most effective application to best fulfil the object and purpose of the treaties in which they are contained, such as the Maputo Protocol.

Therefore, in light of the object and purpose of the Maputo Protocol, a teleological interpretation shows that the persecution, discrimination and stigma experienced by African transgender women on the basis of their gender identity is, as argued in this

[293] Wicks (2012) *HRLR* 218.
[294] HRC 'General Comment No 35' on 'Article 9 (Liberty and security of the person)' 112th Session (7-31 October 2014) para 9.
[295] Para 19.

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research, a violation of their right to security and integrity as well as to a dignified existence.[296] As described by the Coalition for African Lesbians:

> "Violence also results in LGBTI individuals losing their jobs, becoming alienated from their families and communities and struggling to survive. Rejection by family members and society causes isolation, depression and hopelessness".[297]

The aforementioned persecution and stigma violates the universal and equal enjoyment of the right to integrity and security for these women, which it is argued, occurs because these women are denied their gender recognition and is based on discrimination because of their non-normative identities. Moreover, notwithstanding their correlation with the right to life, the rights to integrity and security further confirm the rights to peace and the protection of individuals against cruel, inhumane or degrading treatment.[298] Therefore, the violations as mentioned arguably implicate more than just these women's right to life.

The analysis which follows in this chapter attempts a brief contextualisation of the African legal, cultural and political environment where violations, which occur vis-à-vis transgender women, are often justified on the basis of culturally relativist convictions notwithstanding the fact that the rights to life, integrity and security are inalienable universal rights. These violations are further detailed under 4 4.

4 3 The Rights to Life, Integrity and Security in the Maputo Protocol

Article 4(1) of the Maputo Protocol contains the rights to life, integrity and security of the person and is phrased in a similar manner to the UDHR and African Charter. Article 4(2) provides 11 obligations for State Parties to fulfil in order to ensure the full realisation of these respective rights.

4 3 1 The right to life and relevant corresponding rights

As a point of departure, article 4(1) of the Maputo Protocol confirms that:

> "Every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited".

As discussed under 4 2, the notions of life, security and integrity are interrelated. Thus, the protection and promotion of one of the rights correspondingly affects the protection

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[296] HRC 'General Comment No 36' on 'article 6 of the ICCPR, on the right to life' 124th Session (8 October to 2 November 2018) para 3.
[297] Coalition for African Lesbians & African Men for Sexual Health and Rights *Violence* (2013) 39.
[298] Ramcharan "The Concept and Dimensions of the Right to Life" in *The Right to Life* 10-12; Rehman *International Human Rights Law* 242.

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and promotion of the others, and a violation of one of these rights can result in a violation of one of the others. This indivisibility establishes a framework within which it is possible to conceptualise the intertwined nature of the rights provided for in the article. The African Commission in its *General Comment No 3* describes the right to life as the "fulcrum" of all other human rights.[299] Furthermore, it declares that it is a right which applies to "all persons at all times".[300] This statement, together with the acknowledgement that a variety of other human rights can be read into this right, is noteworthy when demarcating its scope as well as the State Party obligations in light of violations against it.

Accordingly, the promotion of the right contained in article 4(1) confirms the promotion of several other rights provided in the Maputo Protocol. These include articles 2, 3, 5, 10, 13, 18, 19 and 24(1),[301] as all contribute to a holistic and comprehensive realisation of the right to a dignified existence; the quintessential focus of a full realisation of the right to life. The African Commission has stipulated that the responsibility of all states to protect the right to life includes:

> "[P]reventative steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies. The State also has a responsibility to address more chronic yet pervasive threats to life, for example with respect to preventable maternal mortality, by establishing functioning health systems. Such an approach reflects the Charter's ambition to ensure a better life for all the people and peoples of Africa through its recognition of a wide range of rights, including the right to dignity, economic, social and cultural rights, and peoples' rights such as the right to existence and the right to peace".[302]

It is important to bear this interrelatedness in mind during the teleological interpretation of article 4 in the discussion which ensues below.

4 3 2 Identification of causes and eradication of harmful beliefs

A key threat to African transgender women's lives is harmful cultural and traditional beliefs which deny their existence as women and put them at risk of violence due to stigma and discrimination. Causes of this denial and stigma, as discussed under 3 2

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[299] African Commission 'General Comment No 3' on 'the African Charter on Human and Peoples' Rights: the right to life (art 4)' 57th Ordinary Session (November 2015) para 1.

[300] African Commission 'General Comment No 3' on 'the African Charter on Human and Peoples' Rights: the right to life (art 4)' 57th Ordinary Session (November 2015) para 1.

[301] Article 2: elimination of discrimination against women, article 3: right to dignity, article 5: elimination of harmful practices, article 10: right to peace, article 13: economic and social welfare rights, article 18: right to healthy and sustainable environment, article 19: right to sustainable development and article 24(1): special protection of women in distress.

[302] African Commission 'General Comment No 3' on 'the African Charter on Human and Peoples' Rights: the right to life (art 4)' 57th Ordinary Session (November 2015) para 3.

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2, are largely due to a colonial and heteronormative bias imposed within state cultures which are argued in this research to be contrary to the object and purpose of the Maputo Protocol.

Under 4 4, it is illustrated that the invisibility of African transgender women and the denial of their gender recognition violates their human dignity. Article 4(2)(c) of the Maputo Protocol requires an identification of causes of violence against women so that State Parties can prevent such violence from occurring. Violence perpetuated against African transgender women is often as a result of a heteronormative bias and religious persecution. This undermines the identification and existence of transgender women as women which in turn is based on discrimination due to their gender identity, notwithstanding that gender identity, as argued under 2 5 1, is a prohibitive ground against discrimination. Article 4(2)(c) prescribes that:

> "States Parties shall take appropriate and effective measures to: identify the causes and consequences of violence against women and take appropriate measures to prevent and eliminate such violence".

Violence against an individual directly threatens their right to life, integrity and security. As the Maputo Protocol focuses on the rights of women, this article emphasises violence that specifically affects women, because they are women, which is often described within the international legal community as gender-based violence. CEDAW defines gender-based violence as "violence which is directed against a woman because she is a woman or that affects women disproportionately".[303] As noted under 3 2 3, this term is likewise defined under article 1(j) of the Maputo Protocol.[304]

Although the term was initially used to exclusively describe violence against women, a revised understanding of gender-based violence transcends incidents only against cisgender women and includes violence perpetuated against individuals with non-normative gender identities. As mentioned under 3 3 2 and 3 4 1, violence against individuals with non-normative gender identity frequently occurs as a reaction to their "real or imputed" gender identity. As described by the Independent Expert on SOGI,

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[303] CEDAW 'General Recommendation No 19' on 'violence against women' 11th Session (1992) para 6.

[304] "All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war".

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violence based on gender identity operates as "a means to regain control or as a punishment for resisting or transgressing norms or behaviours".[305]

This cause of violence was specifically acknowledged in Resolution 275 as discussed under 3 4 1. Consequently, the violence directed against African transgender women is an intersectional concern as transphobic violence likewise constitutes a form of gender-based violence.[306] In General Recommendation No 35, CEDAW sets out factors they consider exacerbate the discrimination women face. They list being transgender as one of these factors and conclude that:

> "[B]ecause women experience varying and intersecting forms of discrimination, which have an aggravating negative impact the Committee acknowledges that gender-based violence may affect some women to different degrees, or in different ways".[307]

The transphobic violence and/or gender-based violence experienced by transgender women is a heteronormative manifestation as well as human rights violation as it targets these women *because* of their non-normative gender identities, ultimately punishing them for defying gender norms.[308] Transphobic violence, like other forms of gender-based violence, stems from gender norms and stereotypes, enforced by unequal power dynamics.[309] As discussed under 2 3 and 2 4, both post-modern intersectional legal feminist theory and queer legal theory inform that such norms are archaic in consideration of human rights protection.

Accordingly, the State Party obligation, under the Maputo Protocol, to identify the causes of violence and to take measures to eradicate such violence require them to consider the findings put forward in instruments like the African Commission's Resolution 275, the CCPR's *General Comment No 35*, CEDAW's *General Comment No 35*, as well as the Independent Expert on SOGI's 'Report on the protection against violence and discrimination based on SOGI' and to make the required adjustments within their national legislation and policy frameworks. As an example, the Independent Expert on SOGI argues that legislation and public policy which criminalise non-normative gender identities are "contrary to international human rights

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305 HRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 38th Session (18 June-6 July 2018) para 37.
306 Coalition for African Lesbians & African Men for Sexual Health and Rights *Violence* (2013) v.
307 CEDAW 'General Recommendation No 35' on 'gender-based violence against women, updating general recommendation No 19' (26 July 2017) para 12.
308 HRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 38th Session (18 June-6 July 2018) para 48.
309 Para 40.

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law, fuel stigma [and] legitimise prejudice".[310] In light of this, a key action of State Parties to fulfil their obligations under article 4(2)(c) is to remove such legislation and policy due to the fact that it is recognised to be a direct cause of the violence experienced by individuals with non-normative gender identities, including transgender women. This would include legislation that criminalises homosexuality.

Furthermore, article 4(2)(d), stipulates that:

> "States Parties shall take appropriate and effective measures to: actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women".

Peace education is the process of acquiring values and knowledge which promote tolerance and non-violence to facilitate the development of skills which promote the goals of the international community.[311] Disciplines of peace education include focusing on democracy, conflict resolution as well as environmental threats. In addition, peace education incorporates human rights advocacy.[312] Overall, peace education can be described as a system which creates skills to critically analyse the organisation of society that legitimises injustice and inequality.[313]

Notwithstanding the operation of peace education, this research underlines that the purpose of the article is to eradicate elements in traditional and cultural beliefs, practices and stereotypes which contribute to violence against women. Through a teleological interpretation, this purpose is argued to be a mechanism to fulfil the purposes of the Maputo Protocol and to fully realise the rights enshrined within, specifically articles 2 and 5. The qualification of elements is notable as it requires the abandonment of the harmful aspects of traditions and/or customs instead of discarding the entire tradition and/or custom itself. This concedes that although certain aspects of traditions and/or cultural customs may be out-dated and trigger human rights violations, discarding the entire cultural or traditional custom is unwarranted. Respect for customs and traditions is a crucial aspect of promoting state sovereignty, particularly for previously colonised states.[314] However, as noted under 2 5 1, cultural convictions are never justification for the denial of universal human rights. In

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[310] HRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 38th Session (18 June-6 July 2018) para 20.
[311] S Fountain *Peace Education in UNICEF* (1999) 1.
[312] Fountain *Peace Education* (1999) 6.
[313] 39.
[314] Preamble of the African Charter.

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consideration of harmful practices; CEDAW and the CRC in their Joint General Recommendation No 31, define them as:

> "Persistent practices and forms of behaviours that are rounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering".[315]

Moreover, article 5 of the Maputo Protocol sets out that:

> "States Parties shall prohibit and condem all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards".

Harmful practices are rooted in stigma. As set out under 2 4 1, it is the presence and active promulgation of harmful heteronormative beliefs within certain State Parties that facilitate stigma and persecution against African transgender women. This undermines the assurance that their human rights are upheld and protected unequivocally on the basis of universality, alongside their rights to equality and non-discrimination. As discussed in chapter 2, heteronormativity frequently puts individuals with non-normative gender identity at risk. Harmful practices in this context infer attempts to 'fix' and/or correct non-normative individuals to perform in alignment to the binary expectations of how women 'should be' as mentioned under 2 3. Moreover, Joint General Recommendation No 31 confirms that:

> "Harmful practices are deeply rooted in social attitudes according to which women and girls are regarded as inferior to men and boys based on stereotyped roles. They also highlight the gender dimension of violence and indicate that sex and gender-based attitudes and stereotypes, power imbalances, inequalities and discrimination perpetuate the widespread existence of practices that often involve violence or coercion".[316]

Subsequently, the overarching obligation contained in article 4(2)(d) to eradicate elements which "legitimise or exacerbate" violence against women requires firstly an acknowledgement of the effects of patriarchal, heteronormative, homophobic and/or transphobic beliefs and thereafter, an engagement with such beliefs.[317] As discussed under 3 4 2, the due diligence of states requires them to acknowledge and protect those at particular risk of violence and discrimination. The Independent Expert on SOGI argues that this includes implementing measures which acknowledge and eliminate "cultural stigmatization and other social causes of violence and

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[315] CEDAW 'Joint General Recommendation No 31'/ CRC 'General Comment No 18' on 'harmful practices' (14 November 2014) para 15.

[316] CEDAW 'Joint General Recommendation No 31'/ CRC 'General Comment No 18' on 'harmful practices' (14 November 2014) para 6.

[317] Homophobic beliefs are relevant as set out under 2 4 1: because of a conflation of homosexual men and transgender women – transgender women are still sometimes subjected to 'homophobic' violence.

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discrimination".[318] As described by the Coalition for African Lesbians, violence directed against queer women in Africa, including transgender women, "is particularly vicious and brutal due to the multiple and intersecting layers of discrimination facing women in highly patriarchal African families and societies".[319]

4 4 Violations of the rights to life, integrity and security of African transgender women

The international human rights framework, as illustrated under 2 5 1, confirms the recognition of transgender women as women and avails them protection under, for example, the Maputo Protocol. Within this framework, all human rights are interdependent and bestowed on all individuals, regardless of any and all grounds, including discrimination based on cultural and/or traditional beliefs. A teleological interpretation of article 4 of the Maputo Protocol is valuable in considering how African transgender women are discriminated against within the African human rights system and how often their rights to life, integrity and security are violated because they are transgender. Specifically when they are victims of violence and/or harmful cultural practices. This subsection, as noted under 4 1, aims to provide a brief illustration of violations of African transgender women's rights to life, integrity and security to reveal the gap in the application of existing human rights protection.

Within this discussion, causes and justifications of violations are presented and evaluated. This discussion does not aim to give a full account of the circumstances of all African transgender women as it is acknowledged that race, class, socio-economic background, ethnicity and geographical location continuously have an effect – positive or negative – on their positioning as African transgender women. However, some generalisation allows for certain root causes of the violations that occur within the African human rights system to be identified.

4 4 1 Lack of sufficient data

A key aspect of human rights protection is the ability to identify and address human rights violations. Accurate data is required to create awareness of human rights violations and it is essential in order to sufficiently address violence and

[318] HRC 'Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 45th Session (24 June-12 July 2019) para 13.
[319] Coalition for African Lesbians & African Men for Sexual Health and Rights *Violence* (2013) 39.

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discrimination.[320] Without sufficient and accurate data human rights violations go undetected. The lack of data is often as a result of the fact that the most marginalised in society are not able to advocate for themselves. Global NGOs like Amnesty International and Human Rights Watch try to fill this gap by advocating for smaller vulnerable minorities worldwide. However, notwithstanding this advocacy, compared to other parts of the world, incidents of discrimination and violence against individuals with non-normative gender identities continue to go underreported, and this is particularly so within the African human rights system.[321]

A consequence of the lack of adequate data is negation: the denial that violence and discrimination based on gender identity occur and/or that individuals with non-normative gender identities exist.[322] This links with the argument presented under 3 4 1 regarding the invisibility of African transgender women; that violations against them continue to go unnoticed whilst their existence is denied. Therefore, in order to adequately address violations of African transgender women, their existence firstly needs to be acknowledged and then the violations documented. However, as encapsulated by the OHCHR, "quantifying (…) transphobic violence is complicated by the fact that few states have systems in place for monitoring, recording and reporting these incidents".[323] This filters through in the cycle of the denial of existence as well as of violations. Human rights violations against individuals with non-normative gender identities are denied because they are not recorded, these violations are not recorded as these individuals are not recognised and as such there are no systems in place to record them. As discussed under 3 2 2, for African transgender women this is aggravated as the majority of states which do record violations against them, record them as violence and/or discrimination against homosexual men. Accordingly, quantification of the specific violence and violations endured is crucial for states to be able to adequately address, offer redress and prohibit further violence and violations.

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[320] HRC 'Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 45th Session (24 June-12 July 2019) para 12.

[321] Jobson et al (2012) *SAHARA-J: Journal of Social Aspects of HIV/AIDS* 161.

[322] HRC 'Data collection and management as a means to create heightened awareness of violence and discrimination based on sexual orientation and gender identity Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 45th Session (24 June-12 July 2019) para 62.

[323] HRC 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' (17 November 2011) para 23 .

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As a point of departure, the majority of research detailing violations against transgender women worldwide comes from the Inter-American human rights system; specifically, from organisations within the United States of America and select South American states.[324] Often, a bulk of the sources used for a majority of UN reports and research published is research and statistics produced in these (American) states. The experiences of, and violations against, American transgender women make up a majority of the research being done on transgender women in the world. Likewise, in the European human rights system, there is significant work being done to document violations against European transgender women. As an example, Transgender Europe is a NGO which aims "to give trans people a voice and platform in Europe, Central Asia and also the rest of the world".[325] They advocate for the human rights of transgender individuals, raise awareness of specific issues transgender individuals face and encourage collaborative work. Since 2009 they have operated the Transgender Murder Monitoring Project which monitors, collects and analyses reports of murders of transgender individuals worldwide. Whilst they say that they collect data from all regions, it must be noted that South Africa is the only African state appearing in their reports.[326] Accordingly, their report detailing transgender deaths in the years between 2008 and 2018 (incorrectly) reflects that whilst there were hundreds of deaths of transgender individuals worldwide, there were only 17 documented in African states.[327]

Accordingly, the increasing build-up of research done in other parts of the world with regard to the lives and violations against transgender women are not conclusive with regard to the diversity of discrimination and violence on the African continent. The creation of knowledge, publishing of reports and statistics and interpretation of data is useful in drawing common links between regions but risks reinforcing stigma and erasing the multiplicity of experiences. As motivated in queer legal theory discussed under 2 4 1, there is a need for advocacy to represent the experiences of Africans with non-normative gender identities.

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[324] Organisations like the National Center for Transgender Equality and the World Professional Association for Transgender Health.

[325] Transgender Europe "About Us" (2019) *Transgender Europe* <https://tgeu.org/about-us/> (accessed 10-04-2019).

[326] Contributing data was given from Gender Dynamix and the Social, Health and Empowerment Feminist Collective of Transgender Women of Africa ("S.H.E").

[327] Transgender Europe "TvT TMM Update: Trans Day of Remembrance 2018" (2018) *Transrepsct versus Transphobia Worldwide* <https://transrespect.org/wp-content/uploads /2018/11/TvT_TMM_ TDoR2018_Tables_EN.pdf> (accessed 12-04-2019).

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Notwithstanding the gap in formalised data relating to accounts of lives of African transgender women, there is an increasing number of grass roots organisations within the African regional human rights system who contribute to making African transgender women more visible. Even though there is a massive gap in the data relating to formalised statistical data capturing violations against African transgender women's lives, integrity and security; it is acknowledged that there is an increasing number of individual accounts of violations which are helping to expand the knowledge and resources of advocacy groups. Ogwaro argues that:

> "There is no substantive research yet as to how many transgender people are killed in Africa but one will not fail to come across news stories of transgender people being harassed, discriminated against or jailed on the continent".[328]

A key concern here stands out, namely, that with regard to issues of African individuals with non-normative SOGIs, transgender concerns are comparatively overlooked.[329] As argued by Winter, "stigma discourages transgender persons from making their transgender status known (…) these and other considerations present challenges to the researcher attempting to ascertain the size of the transgender population".[330] In May 2018 the Independent Expert on SOGI Rights published a report regarding violence and discrimination against individuals based on their SOGI. Within this report he noted that because:

> "[T]he murders of trans and gender non-conforming people are not systematically recorded and that in most countries a system to produce adequate data is not even in place, the actual number is certainly much higher".[331]

This statement highlights the international community's obliviousness on the frequency of murders of transgender women. Moreover, in the African regional human rights system, many of the violations documented against transgender women are done incorrectly, miscategorising them as homosexual men. In a report submitted to the HRC regarding violations against individuals with non-normative identities in Ghana, it was noted that:

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328 G Ogwaro "All lives matter – the social death 'penalty' for transgender persons" (21-11-2018) *Centre for Human Rights University of Pretoria* <http://www.chr.up.ac.za/sogie-news/1103-all-lives-matter-the-social-death-penalty-for-transgender-persons> (accessed 21-02-2019).
329 Oloka-Onyango (2015) *AHRJ* 49.
330 Winter et al (2016) *Lancet* 392.
331 HRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 38th Session (18 June-6 July 2018) para 41.

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> "Homophobia is very common in Ghana, and transphobia would likely be as well but for the fact that the social climate is so bad that transgender individuals keep their gender identity hidden".[332]

Notwithstanding the fact that transgender women are not criminalised per se, as discussed under 3 3 1 their invisibility combined with the criminalisation of homosexuality in a number of African states continuously poses a risk for their persecution to continue. It creates an environment where their specific challenges are unrecognised and unresolved. This again affirms the fact that the effects of denying gender recognition as set out under 3 2 2 impacts these women's ability to have their dignity as well as their status as legal subjects and citizens protected. As an example of this, illustrated through the position of transgender individuals in Swaziland, Vilane argues that:

> "Swaziland has no statistics on the hate crimes imposed on transgender populations. This could be due to systematic erasure, or wariness to report these crimes. Transgender people in Swaziland cannot access full citizenship".[333]

To date, the majority of sources, which attest to the experiences and violations of African transgender women are predominantly autobiographical in nature or form part of news media or NGO reports. Accordingly, there is a gap in academic literature.[334] As noted by the OHCHR:

> "Despite positive developments, most [states] lack comprehensive policies to address human rights violations against [SOGI minorities]. Even where these are in place, most states do not collect relevant data to measure and evaluate their effectiveness (…) Measures to address violence and discrimination faced by trans people lag far behind those adopted to address issues related to people who are lesbian, gay or bisexual. Critically, *most states do not recognize trans people's gender identity*; the majority of those that do continue to impose abusive preconditions that violate international human rights standards, national and international medical classifications continue to pathologize trans persons and identities". [emphasis added][335]

Comprehensive data which records violations can verify and expose perpetrators and keep State Parties accountable in their positive obligations to protect the human rights of all individuals and fulfil their due diligence. Moreover, State Parties will only be able to fulfil their obligations set out in articles 4(2)(c) and 4(2)(d) when they have accurate

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332 Solace Brothers Foundation, The Imitative for Equal Rights, Center for International Human Rights of Northwestern University School of Law & Heartland Alliance for Human Needs & Human Rights Global Initiative for Sexuality and Human Rights *Human Rights Violations Against Lesbian, Gay, Bisexual, And Transgender (LGBT) People in Ghana: A Shadow Report* (2015) 5.

333 V Vilane "Experiences of transgender people in Swaziland" in Z Matebeni, S Monro & V Reddy (eds) *Queer in Africa: LGBTQI Identities, Citizenship, and Activism* (2018) 188.

334 V Reddy, S Monro & Z Matebeni "African Studies" in Z Matebeni, S Monro & V Reddy (eds) *Queer in Africa: LGBTQI Identities, Citizenship, and Activism* (2018) 17.

335 OHCHR *Living Free & Equal: What States are doing to tackle violence and discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People* (2016) 11.

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information regarding the situations of violence and violations against transgender women, including the causes and consequences as well as the motivating and mitigating factors of violations.

4 4 2 Cultural justifications for violations

As reiterated throughout this research, the human rights of African transgender women are often violated because they are transgender and these violations are justified in light of certain religious and/or cultural convictions, which contradict the principle of universality as discussed under 2 5 1. Under 2 4 1, it was noted that due to their heightened visibility, African transgender women in particular face victimisation. Simultaneously, any kind of persecution which is justified by cultural relativism as discussed under 2 5 2, opposes the categorical universal nature of human rights protection. Regardless of the variety and intelligibly of arguments for the protection of the rights of African transgender women, the conflict in African social and legal discourses continue. As summarised by Reddy et al:

> "The tensions between 'legal' protection on the one hand and cultural beliefs on the other hand remain a serious challenge to the ongoing fashioning and mobilisation of African queer identities".[336]

In the African human rights system, there is a pronounced interrelation between religious traditions and the law.[337] This is often identified as a legacy of colonisation and the import of Islam and Christianity into the African colonies. Many African states have continued to operate with an emphasis on their societies' religious and traditional customary beliefs since they gained independence and established their respective democracies. Further complicating the issue is the fact that the balance of integrating traditional practices with modern legal systems requires care. On the one hand, asserting a global agenda, which threatens to undermine traditional values and beliefs is contrary to state sovereignty and retaining a national identity. On the other hand, as set out under 2 5 1, the maintenance of harmful traditional and cultural practices are not justification for human rights violations. However, this view is arguably not shared by large parts of the African political and religious elite. As noted under 2 5 2 it is still a practice for heads of state and/or influential religious leaders to incite violence

336 Reddy et al "Introduction" in *Queer in Africa* (2018) 2.
337 Ibrahim (2015) *AHRLJ* 267.

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against individuals with non-normative gender identities and to justify such violence as part of a mandate to ensure the protection of African 'cultural beliefs'.[338]

Such violence is merely one aspect of the violations African transgender women continue to experience because of harmful heteronormative and transphobic beliefs, which are rationalised as traditional and/or cultural beliefs. As an example, in 2011, two Cameroonian transgender women were arrested, detained, tried and convicted on the basis of homosexuality because they "were wearing women's clothes" and they "looked feminine".[339] Another example occurred in 2015 when a Nigerian man (as described in the documents) was arrested and detained, solely on the charges of "walking [and] acting like a woman".[340] What is particularly alarmingly with regard to the latter example is that the formal reports were not able to specify if that individual identified as a transgender woman, a homosexual man or if they were just someone who appeared to present as feminine. Nonetheless, their non-normativity was seen by officials as sufficient grounds for them to be arrested and detained; a clear violation of their rights to liberty and security.

State Parties have the obligation to ensure the protection of rights as set out in the Maputo Protocol, which are aligned to the core principles of international human rights law. These include the right to non-discrimination as well as the right to dignity. Overall, there are three main aspects of the justifications of violations to the rights of African transgender women. Firstly, the persistent cultures of patriarchy, homophobia, transphobia and heteronormativity notably contribute to cultural justifications for violence. The rights to life, security and integrity are particularly threatened by these cultures, as is further explored below under 4 4 3. Secondly, the embodiment of these cultures in religious and social hierarchies in certain African states is often used to justify sentiments of non-normative individuals not qualifying as African as they choose to live their lives in opposition to the religious and cultural values of the continent. Olaoluwa argues that this dominant perspective that "gender variance [is] 'un-African' is related to the purchase of Christianity and Islam, two Abrahamic religions that have dominant influence on contemporary Africans".[341] A key aspect of this, the strict

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338 Coalition for African Lesbians & African Men for Sexual Health and Rights *Violence* (2013) 17.
339 Advocates for Behavioural Change et al *Human Rights Violations Based on Sexual Orientation and Gender Identity in Nigeria* (2015) 15.
340 15.
341 S Olaoluwa "The human and the non-human: African sexuality debate and symbolisms of transgression" in Z Matebeni, S Monro and V Reddy (eds) *Queer in Africa: LGBTQI Identities, Citizenship, and Activism* (2018) 20.

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application of Sharia law and its implication for the violation of the rights of African transgender women, is further discussed below under 4 4 3. A final key contributing factor to the justification of discrimination of African transgender women is found in a persistent lack of education and exposure to individuals with non-normative gender identities. Such unfamiliarity, in a polarised environment, breeds an atmosphere of stigma, discrimination and violence. Often, non-normative individuals, including transgender women, are ostracised in their communities as it is believed that they are "cursed" and/or sick with a disease categorised as deadly and infectious.[342] This links with the positive obligations contained in both articles 4(2)(c) and 4(2)(d) as education and destigmatisation can prevent violence and help to develop traditions and customs to be more tolerant of individuals with non-normative gender identities. Related to this, the discussion that follows under 5 4 2 which deals with the pathologisation of transgender women. This subsection aims to illustrate the consequences of the beliefs which regard them as intrinsically disordered as a result of their non-normative gender identity and how this is fundamentally a human rights violation.

All of the aforementioned considerations are relevant in acknowledging the plight of the persistent violence against African transgender women which implicate their ability to enjoy their rights to life, integrity and security. As referred to throughout this research, the misperception of their identities manifests in exacerbated "stigma, harassment, and sexual and physical violence at the hands of family members, their communities and state actors".[343] Their aggravated vulnerability additionally is a result of the fact that these women often have no right of recourse if attacked, beaten and/or violated as they are at risk to become victims of further brutality and/or rape when seeking help.[344] Some of these instances of stigmatisation and violence are further presented below, to highlight, rather than attempt to provide an exhaustive discussion, on violations against African transgender women.

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[342] Advocates for Behavioural Change et al *Human Rights Violations Based on Sexual Orientation and Gender Identity in Nigeria* (2015) 8.

[343] Legal Resources Centre, Iranti-Org & Gender Dynamix *Report on the civil, political and socio-economic rights of transgender and intersex persons in South Africa under the African Charters on Human and Peoples' Rights in response to the second combined report of the Government of South Africa and the initial report under the Protocol to the African Charter on the Rights of Women in Africa* (2016) 5-7.

[344] OHCHR *Living Free & Equal: What States are doing to tackle violence and discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People* (2016) 40.

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4 4 3 Illustrations of violations

As a point of departure, the deprivation of African transgender women's ability to live a dignified existence, including being safe from threats of sexual and/or physical violence, are all violations of their right to life. This includes situations where African transgender women are forced into poverty, experience persecution and/or and are forced to live as social, economic or legal outcasts. This acknowledgement is significant in light of the State Party obligations discussed throughout this research. In light of the underlying due diligence of all states, the HRC in its *General Comment No 36* sets out that*:*

> "The duty to protect the right to life requires States parties to take special measures of protection towards persons in situations of vulnerability whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence. These include (…) transgender persons".[345]

Moreover, it is a grave cause for concern that worldwide police officers are often key perpetrators of violence and life-threatening conduct against transgender women.[346] This is worsened by the consideration that it is a police officer's duty, as an official of the state, to ensure the protection of human rights of all individuals, including that of the right to life, integrity and security. As an example, because transgender women are frequently denied recognition of their gender identity, when they are arrested and detained, they are kept in cells with men. This exacerbates their vulnerability and their exposure to general, as well as sexual, violence at the hands of other individuals in jail.[347] Furthermore, police officers are regularly accused of taking advantage of transgender women; forcing them to perform sexual acts, humiliating them or subjecting them to other forms of inhumane or degrading treatment. These are clear violations to their integrity and security as discussed under 4 2 2. As explained by the UN Special Rapporteur on torture with regard to the frequency of violations worldwide:

> "[M]embers of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place. In 2010, [it was noted] that, in detention facilities, there was usually a strict hierarchy, and that those at the bottom of the hierarchy, such as gays, lesbians, bisexuals and transgender persons, suffered double or triple discrimination. [It] has highlighted the susceptibility of male-to-female transgender

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345 HRC 'General Comment No 36' on 'article 6 of the ICCPR, on the right to life' 124th Session (8 October to 2 November 2018) para 23.

346 OHCHR *Born Free & Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012) 67.

347 23.

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prisoners to physical and sexual abuse if placed within the general prison population".[348]

As reiterated throughout this thesis, on the African continent, harmful cultural and religious persecution as well as the misidentification of transgender women as homosexual men and/or assumption as sex workers is often used as a justification for such violence and violations. This persecution is a manifestation of "deeply entrenched stigma and prejudice, irrational hatred and a form of gender-based violence, driven by an intention to punish those seen as defying gender norms".[349]

However, police officers are not the only perpetrators of violence and as mentioned under 4 4 2, sexual violence and violations against the bodily integrity of African transgender women are often perpetuated by members of their own communities.[350] One of the most severe examples of a violation is the act of "corrective" and/or "punitive" rape, as mentioned under 3 4 1. This is a form of sexual violence, which is committed against transgender women and warranted as a response 'necessary' to 'fix' them.[351] In this regard, acts of sexual violence are perpetrated by cisgender heterosexual men against individuals who are seen to threaten the heteronormative hierarchy, to punish these women based on their own deeply entrenched stigma and prejudice.[352]

Compared to the physical effects of the violations set out, the consequences for African transgender women's mental health and mental integrity are more challenging to assess and are further discussed under 5 2 2. Notably, the variety and severity of discrimination and violence experienced by African transgender women arguably links to their high rates of depression, suicide and self-harm. Moreover, the violence experienced by these women coupled with them being ostracised from family and society poses a direct threat to their enjoyment of life.[353] As established, African transgender women are likely to be shunned by their families and communities,

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348 OHCHR *Discriminatory laws and practices* (2011) 12.
349 HRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 38th Session (18 June-6 July 2018) para 48.
350 Coalition for African Lesbians & African Men for Sexual Health and Rights *Violence* (2013) 11.
351 HRC 'Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 38th Session (18 June-6 July 2018) para 69.
352 Para 245.
353 KB Jackman, C Dolezal, B Levin, JC Honig & WO Bockting "Stigma, gender dysphoria and nonsuicidal self-injury in a community sample of transgender individuals" (2018) 269 *Psychiatry Research* 602-609.

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struggle to maintain formal employment, often lack access to general social security and are deemed a high-risk population for depression and suicide.[354]

As discussed under 3 4 2, an additional factor exacerbating the risk and undermining African transgender women's enjoyment of life is the prevalence of them engaged in the sex work industry. In this regard, these women often find themselves in high-risk situations, which aggravate their vulnerability. Conclusively, violence against sex workers is a common occurrence and disproportionately affects transgender women as an intersectional concern. This is further aggravated by the fact that whilst sex work is increasingly seen as a legitimate form of work in certain states, it remains criminalised in a majority of African states.[355] Due to their proportionally high engagement in sex work, transgender women further experience an increased exposure to HIV infections. This issue is discussed under 5 4 3 in the context of their right to life and integrity as the discriminatory treatment these women face is undoubtedly a human rights violation.

Moreover, the increasing cases of transgender women who seek asylum from their birth state due to persecution of their gender identity frequently threatens their lives, integrity and security. Currently on the African continent, gender identity is a rising ground for individuals to seek asylum outside of their national state. At the time of the writing of this research, South Africa is still the only African state and State Party to the Maputo Protocol which has legal provisions for asylum for discrimination, persecution and violence based on gender identity.[356] Koko et al argue that:

> "There are many places in Africa (including Tanzania, Kenya, and Nigeria) where (…) transgender people are at a high risk of death and therefore have no option but to flee. In their countries of origin, [individuals with non-normative SOGI] are exposed and subjected to discrimination, persecution, exclusion and violence, murder, and rape at the hands of state and non-state agents".[357]

Camminga describes transgender individuals who seek asylum as "gender refugees".[358] The experiences of gender refugees within South Africa is still relatively

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354 A Müller *Sexual and Reproductive health for Transgender and Gender Non-Conforming People: Guidelines for Health Care Workers in Primary Care* (2013) 8.

355 Mgbako & Smith (2011) *Fordham International Law Journal* 1181-1185.

356 M Gevisser "Love in exile" (27-11-2014) *The Guardian* <https://www.theguardian.com /news/2014/nov/27/-sp-transgender-relationship-jail-exile-tiwonge-chimbalanga> (accessed 21-02-2019).

357 G Koko, S Monro & K Smith "Lesbian, gay, bisexual, transgender, queer (LGBTQ) forced migrants and asylum seekers: Multiple discriminations" in Z Matebeni, S Monro & V Reddy (eds) *Queer in Africa: LGBTQI Identities, Citizenship, and Activism* (2018) 158.

358 B Camminga ""Gender Refugees" in South Africa: The "Common Sense" Paradox" (2018) 1 *Africa Spectrum* 90.

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insecure with regard to the full realisation of their human rights. Camminga notes that often these individuals are met with either xenophobia from ill-informed and fearful South Africans and/or prejudice from their own home state being brought with by other asylum seekers and endangering them.[359] Furthermore, the issue of incongruent documents as mentioned under 3 2 2 implicates the ability of African transgender women to safely and legitimately integrate into society whilst their documents state male and they present as female; it is harder for these women to access shelters or housing, employment and/or healthcare services.[360] Camminga argues that:

> "Gender refugees, in coming to South Africa, and applying for asylum, enter a kind of limbo: they cannot go but they also struggle to stay. They are allowed in but evidently nothing more".[361]

Camminga refers to the fact that this impacts their ability to have a "liveable life", a term which reflects the description similar to what this research earlier set out as a dignified existence. This undermines the legal guarantee of these women's protection against discrimination, on the basis of them being both transgender as well as asylum seekers.[362] The guarantee of the rights of women set out in the Maputo Protocol does not attach to citizenship.[363]

Lastly, the most severe violation to the right to life as discussed under 4 2 1 is capital punishment. For African transgender women, the death penalty on the basis of real and/or perceived non-normative gender identity arbitrarily endangers them as they are continuously conflated with homosexual men. At the time of writing, homosexuality is still punishable by death, as part of the strict application of Sharia law in the northern states in Nigeria, certain areas of Somalia, Mauritania as well as Sudan.[364] However, in their *General Comment No 3* the African Commission unequivocally declared that:

> "The African Charter does not include any provision recognising the death penalty, even in limited circumstances, and the Commission has on several occasions passed resolutions calling on States to abolish the death penalty, or to establish a moratorium in line with the continental and global trend".[365]

The Commission continued to argue that international human rights law requires all states who have not yet abolished the death penalty to take measured steps towards

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[359] Camminga (2018) *Africa Spectrum* 90.
[360] 102.
[361] 108.
[362] OHCHR *Discriminatory laws and practices* (2011) 5.
[363] Preamble of the Maputo Protocol.
[364] Coalition for African Lesbians & African Men for Sexual Health and Rights *Violence* (2013) 33.
[365] African Commission 'General Comment No 3' on 'the African Charter on Human and Peoples' Rights: the right to life (art 4)' 57th Ordinary Session (November 2015) para 22.

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its abolition in pursuit of ensuring the rights to life and dignity as well as the rights to be free from torture, and cruel, inhumane and/or degrading treatment. Accordingly, in light of this statement together with the general obligation contained in article 4(1), there is no justification for State Parties to still have the death penalty, particularly not in the instances of discrimination based on these women's non-normative gender identities.

4 5 Conclusion

The right to life is the most fundamental human right and its realisation is coupled with the realisation of the rights to dignity, integrity, security, equality as well as non-discrimination. The right is provided for in a variety of international human rights instruments including the Maputo Protocol. In this chapter, cultural justifications were identified as a key contributing factor to the persistence of discrimination, persecution and violence against African transgender which threatens their right to life. Thereafter, it was presented that a teleological interpretation of articles 4(1), 4(2)(c) and 4(2)(d) of the Protocol illustrates the obligations on State Parties to eliminate harmful cultural beliefs and/or practices which instigate violence against African transgender women, as such beliefs, practices and violence often result in violations of their right to life. Moreover, in consideration of violations against African transgender women's right to life, the lack of data recording and monitoring such violations is noteworthy and requires action on behalf of State Parties. The discrimination, persecution and violence perpetuated against African transgender women is noted to be contrary to international human rights law as well as the specific object and purpose of the Maputo Protocol.

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CHAPTER 5

THE RIGHT TO HEALTH OF AFRICAN TRANSGENDER WOMEN

5 1 Introduction

The right to health is a fundamental human right, which like the right to life as discussed in chapter 4, is essential for the enjoyment of other human rights. Whereas chapter 4 dealt with African transgender women's rights to life, integrity and security as contained in article 4 of the Maputo Protocol, this chapter aims to similarly assess the rights as contained in article 14 of the Maputo Protocol, namely; health and reproductive rights. This assessment equally considers the theoretical framework set out in chapter 2; as based on the notion that human rights protection is granted to all individuals based on equality, non-discrimination and universality. As argued in chapter 3, the denial of gender recognition is a fundamental violation of the right to dignity. This chapter further expands on this argument and submits that the continuous pathologisation of African transgender women, denial of gender affirming services as well as access to HIV/AIDS services ultimately violates both their rights to health and dignity.

5 2 The right to health

5 2 1 The right to health as an inalienable human right

The right to health is an inclusive right and a core aspect of the human rights framework.[366] As described by the CESCR:

> "Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity".[367]

As a point of departure, the right to health was first codified in 1946 as part of the Constitution of the World Health Organization ("WHO Constitution").[368] In the preamble, it was described as a state of "complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity".[369] The WHO

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366 CESCR 'General Comment No 14' on 'the right to the highest attainable standard of health (art 12)' 22nd Session E/C.12/200/4 (11 August 2000) para 11.
367 Para 1.
368 UNGA, "Constitution of the World Health Organization" A/RES/131 (17-11-1947) <https://treaties.un.org/doc/Treaties/1948/04/19480407%2010-51%20PM/Ch_IX_01p.pdf?> (accessed 16-05-2019).
369 UNGA "Constitution of the World Health Organization".

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Constitution furthermore specified that the right is guaranteed for all individuals, and must be provided for "without distinction of race, religion, political belief, economic or social condition".[370] Subsequently in 1948, the right to health was outlined in the UDHR where article 25(1) affirms that:

> "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".[371]

Moreover, the right to health is set out in article 12 of the ICESCR. Article 12(1) states that all individuals have the right to "the enjoyment of the highest attainable standard of physical and mental health" and article 12(2) provides a non-exhaustive description of the state obligations with regard to the realisation of this right. The notion of this standard is discussed below in order to assess State Party obligations to fully realise the right as well as to enable a comprehensive understanding of a teleological interpretation of article 14 of the Maputo Protocol.

It is established that the right to health does not simply equate to the right to be healthy. Instead, it is a right which contains both "freedoms and entitlements" which comprise of a range of socio-economic considerations necessary for all individuals to lead healthy lives.[372] These are described as "underlying determinants of health"[373] and include but are not limited to: food and nutrition, access to safe drinking water and sanitation, safe and healthy working and environmental conditions, health-related education, housing as well as gender equality.[374] Furthermore, the right to health is made up of four key and interrelated elements, namely: availability, accessibility, acceptability and quality.[375] 'Availability' includes the sufficient provision of health facilities, good and services, as well as programmes, within states. 'Accessiblity' is intrinsically linked to the principle of non-discrimination and requires all health facilities, goods and services to be within reach of all individuals without discrimination. This includes being within physical reach, being affordable as well as ensuring access to information. 'Acceptability' includes all health facilities, goods and services to be in

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370 MS Giorgi *The human right to equal access to health care* (2012) 10.
371 (adopted 10 December 1948) UNGA Res 217 A (III).
372 CESCR 'General Comment No 14' on 'the right to the highest attainable standard of health (art 12)' 22nd Session (11 August 2000) E/C.12/200/4 para 8.
373 OHCHR & WHO *The Right to Health* (2008) 1.
374 CESCR 'General Comment No 14' on 'the right to the highest attainable standard of health (art 12)' 22nd Session (11 August 2000) E/C.12/200/4 para 16.
375 Para 12.

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accordance with medical ethics as well as culturally sensitive. As described by the CESCR this means that:

> "All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-style requirements, as well as being designed to respect confidentiality and improve the health status of those concerned".[376]

Finally, the qualitative aspect of the right requires it to be culturally acceptable and scientifically and medically appropriate.

These standards are important when assessing the realisation of State Party obligations, specifically with regard to the provision of these rights for vulnerable minorities such as transgender women. Herein, two key points are notable: firstly, that all facets of health (mental, physical, sexual and reproductive) deserve equal provision. Secondly, that there is an obligation for the non-discriminatory provision for, and equal protection of, all individuals and their right to health. Article 2(2) of the ICESCR sets out the prohibited grounds of non-discrimination for all the rights set out within, including the right to health. The list of grounds is not exhaustive and in the CESCR's *General Comment No 20*, it sets out that when reading "other status":

> "[G]ender identity is recognised as among the prohibited grounds of discrimination; for example, persons who are transgender (…) often face serious human rights violations".[377]

This confirms the argument set out under 2 5 1 that gender identity is a prohibited ground. In addition, the right to health is interlinked with the right to dignity. As described by San Giorgi:

> "[B]y virtue of *being* a human being, all individuals are equally entitled to their corresponding inalienable human rights, including the right to health care (…) as discrimination violates the principle of equality, the prohibition of discrimination seeks to ensure that all persons can enjoy and exercise their right to equal access to healthcare".[378]

This assertion places an emphasis on healthcare as a crucial aspect of the right to health. It additionally affirms the universality, equality and non-discrimination exemplified in this right.

A key aspect of the right to health focused on in this thesis is healthcare, which is interchangeably referred to as primary and/or essential healthcare. This includes access to health facilities, goods and services which, as defined above, are available,

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376 CESCR 'General Comment No 14' on 'the right to the highest attainable standard of health (art 12)' 22nd Session (11 August 2000) E/C.12/200/4 para 12(c).
377 CESCR 'General Comment No 20' on 'non-discrimination in economic, social and cultural rights (art 2, para 2)' E/C.12/GC/20 para 32.
378 Giorgi *The human right to equal access to health care* 3.

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acceptable and of good quality. It also includes the provision of essential drugs.[379] As described by the CESCR, the core obligations contained within the right to health require states to satisfy the minimum levels of healthcare, namely primary healthcare.[380]

The Alma-Ata Declaration was adopted at the International Conference on Primary Healthcare in 1978.[381] It was the first international instrument which emphasised the importance of primary healthcare within the international community and expressed an urgent need for action by governments to prioritise the right. As defined in the Declaration, primary healthcare is based on:

> "[P]ractical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families in the community through their full participation and at a cost that the community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination".[382]

This description emphasises the importance of universal accessibility to basic healthcare which clearly reflects the principle of universality. San Giorgi argues that crucial elements of this include equitable as well as non-discriminatory access to healthcare.[383] Thus, such an argument is a confirmation of the prevalence of the key underlying principle and rights of international human rights law to this right. However, as seen with the application of the rights discussed in the preceding chapters, African transgender women are often not warranted such protection and provision of their rights in practice (due to discrimination) and this is an infringement of their rights.

The point of departure for the right to health within the African human rights system is found in article 16 of the African Charter:

> "Every individual shall have the right to enjoy the best attainable state of physical and mental health [and] States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick".

Article 16(1) mentions both physical as well as mental health within the conceptualisation of the right and article 16(2) sets out the obligation for State Parties to protect the health of all their citizens as well as to ensure that all individuals receive

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379 CESCR 'General Comment No 14' on 'the right to the highest attainable standard of health (art 12)' 22nd Session (11 August 2000) E/C.12/200/4 para 12(a).
380 CESCR 'General Comment No 14' on 'the right to the highest attainable standard of health (art 12)' 22nd Session (11 August 2000) E/C.12/200/4 para 43.
381 International Conference on Primary Health Care "Declaration of Alma-Ata" (12-09-1978) *World Health Organisation* <http://www1.paho.org/English/DD/PIN/alma-ata_declaration.htm> (accessed 22-05-2019).
382 Article IV.
383 Giorgi *The human right to equal access to healthcare* 63.

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medical attention when sick. In order to grasp the implementation of this right, the case law of the African Commission is useful. In *Purohit* the African Commission confirmed the scope of the right to health as contained in article 16.[384] It stated that:

> "Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind".[385]

In *Egyptian Initiative for Personal Rights and Interrights v Egypt ("Interrights")*[386] the African Commission further confirmed that the right to health operates as a "prerequisite to all other human rights recognised by the African Charter"[387] and that:

> "States have a legal obligation to protect the right to health of all its citizens, including *inter alia* taking concrete and targeted steps towards the full realisation of the right, and adopting legislation or other measures to ensure equal access to health-related services and health care".[388]

A key concern with regard to realisation of the right to health is the impact of adequate resources, or rather lack thereof. Often, the respective development of a State Party impacts their availability of adequate resources and thus ability to realise the right to health. Notwithstanding that this is an important aspect to consider when assessing implementation of the right, both the WHO and OHCHR surmise that a state cannot justify a failure to fulfil its obligations on these grounds. Additionally, both argue that "states must guarantee the right to health to the maximum of their available resources, even if they are tight".[389] The African Commission in *Purohit* made a similar concession that:

> "[M]illions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind".[390]

As mentioned under 1 1, because the Maputo Protocol is a complementary instrument to the African Charter, these instruments share applicable context. Accordingly, the

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384 (2003) AHRLR 96 (AHCPR 2003).
385 Para 80.
386 (2011) Communication 323/06.
387 Para 261.
388 Para 264.
389 OHCHR & WHO *The Right to Health* (2008) 5.
390 Para 84.

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aforementioned comment relates to an application of the Maputo Protocol as part of the African human rights system.

The right to health of African transgender women incorporates their right to mental, physical as well as sexual health and their interlinked entitlements to a dignified existence (as set out in chapter 3) and to bodily integrity (as set out in chapter 4). The subject of discrimination in healthcare and its effect on the enjoyment of other human rights is further discussed under 5 4 1. Unfortunately, the goal of the highest attainable standard of health, or even adequate health, is not reflected in the lived reality of many individuals with non-normative gender identities worldwide. This is a result of a variety of factors, including but not limited to, economic and social exclusion. Particularly on the African continent, high rates of poverty are directly linked to reduced access to, and enjoyment of, adequate healthcare. This deficiency is further exacerbated for individuals with non-normative gender identities such as African transgender women, due to discrimination and marginalisation by healthcare workers, as discussed under 5 3 1 and 5 4 1.

5 2 2 Gender affirming hormones and procedures as part of the right to health

Gender recognition is an intrinsic aspect of realising the right to dignity. As argued under 3 2 2, gender recognition is an issue which often only affects transgender women as cisgender women are rarely required to defend their gender identity.[391] This subsection aims to explore how gender affirming hormones and procedures are aspects of gender recognition, and how through their provision, the right to dignity as well as the right to health of transgender women can be realised. For the purposes of conceptualising transgender women in this research, it was stated in chapter 2 that it is irrelevant whether or not they desire to have gender affirming surgery. However, this specific discussion focuses on African transgender women who seek gender affirming hormones and procedures but are faced with significant barriers in accessing such treatments. Such barriers include discrimination and stigma as well as economic and social exclusion.

For transgender women who want to obtain gender affirming treatment and/or surgery, it is an infrequent and expensive undertaking on the African continent. An implication of this is that a majority of African transgender women who experience

[391] JT Theilan "Depathologisation of Transgenderism and International Human Rights Law" (2014) 14 *Human Rights Law Review* 332.

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distress with their bodies are unable to affirm their gender identities physically. This continuous distress is arguably a violation of their bodily integrity and autonomy which can lead to mental as well as physical health problems.[392] The statistics of depression and suicide for transgender individuals in general are high. As described by Müller, "anxiety and depression are widespread amongst trans people and as many as 40 per cent have, at one point in their lives, attempted suicide".[393] Müller further argues that gender affirming hormones and access to treatment is decisive in being able to promote their ultimate mental and physical wellness and health, which he describes as "self-actualisation".[394]

As briefly discussed under 2 2, the administration of hormones is the least invasive manner in which transgender women can affirm their gender identities. Transgender women specifically require the administration of oestrogen as well as anti-androgens.[395] There are several ways in which hormones can be dispensed but popular methods include injections, oral pills, cream and/or a patch.[396] A key benefit identified of hormone therapy is the physical changes which reflect and affirm an individual's gender identity and expression, making them feel validated. The next step in gender affirming treatment is gender affirming procedures. For transgender women, these include: a chest surgery (an augmentation mammoplasty), a penectomy, orchiectomy and vaginoplasty.[397]

A key reason why a majority of African transgender women do not obtain gender affirming procedures is due to a lack of information and/or funds as well as a lack of willing and trained professionals to aid in administering hormones and/or to perform the procedures.[398] However, if it is established that gender recognition is a fundamental aspect of the right to dignity and that gender affirming procedures are inherent within the conceptualisation of 'healthcare', justifications for their denial are in clear contradiction to the realisation of the principles of accessibility and acceptability. 5 4 2 focuses on how, in certain states the provision of gender affirming

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392 Theilan (2014) *Human Rights Law Review* 331.
393 Müller *Sexual and Reproductive Health for Transgender and Gender Non-Conforming People* (2013) 8.
394 12.
395 13.
396 13.
397 A chest surgery for a transgender woman increases their breast size. A penectomy is the surgical amputation of the penis. An orchiectomy is the surgical amputation of the testicles. Lastly, a vaginoplasty is the surgical construction of a vagina.
398 C Bateman "Transgender patients sidelined by attitudes and labelling" (2011) 101 *SAMJ* 92.

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care is administered only once a pathologised diagnosis is issued. Conversely, with regard to the realisation of health rights in the international community, the Independent Expert on SOGI argues that:

> "[T]he need to ensure access to comprehensive care for all, including gender affirming care, "without reporting to labels that give rise to stigma" and has reinforced the call for States "to provide equal access to healthcare and access to gender affirming treatment to those who seek it.""[399]

South Africa is the only State Party to the Maputo Protocol with legislation that specifically facilitates the legal recognition of transgender women.[400] Consequently, South Africa is the only State Party to the Maputo Protocol where gender affirming procedures are available and performed. However, there are only two hospitals where such services are provided and surgeries actually occur: the Steve Biko Academic Hospital in Pretoria and Groote Schuur in Cape Town.[401] It is estimated that these hospitals provide four gender-affirming surgeries per year and that the waiting period is up to 25 years.[402] As explained by Müller:

> "The waiting list is very long (…) As a result, some transgender people seek surgical care overseas if they can afford it. Gender Dynamix's recent study on access to healthcare has shown that gender-affirming surgery is not a concern for most transgender people living in South Africa [as] the realities of limited access, as well as other ways to perform the identified gender, make it a lesser priority than access to hormone treatment".[403]

Therefore, notwithstanding the fact that gender-affirming treatment is a possibility in South Africa, it is an exclusive occurrence due to administrative and financial obstacles which often prioritise transgender women with private healthcare and/or greater financial means. Furthermore, even if that financial threshold is overcome, issues of stigma and discrimination can violate these women's dignity and ability to access healthcare equally and on a non-discriminatory basis. Therefore, even in states like South Africa where provision is made for these specific health needs, there are substantial accessibility and affordability issues which manifest as violations of the rights of transgender women to receive affirming procedures, to have their gender physically recognised, i.e. to have their rights to dignity and health realised. With regard to South Africa, Bateman argues that:

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399 Kara *Gender is not an illness* (2017) 12 quoting UN Independent Expert on SOGI: (A/HRC/35/36) April 2017, para 58, (A/72/172) July 2012, para 21.
400 This was noted under 3 2 2: the Alteration of Sexual Description and Sex Status Act.
401 Bateman (2011) *SAMJ* 91.
402 A Scheibe, LL van der Merwe, A Cloete & MA Grasso "Transgender women outreach workers and their role in South Africa's HIV response" (2018) 8 *SAHR* 71.
403 Müller *Sexual and Reproductive health for Transgender and Gender Non-Conforming People* (2013) 19.

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> "Attempts to access care in the public sector where facilities, staff and protocols exist, often result in humiliation, up to 6 years waiting on surgical lists and sometimes being routed via the private sector at major expense, with no guarantee of an outcome. [Thereafter] the bigger barrier (…) (to surgery for transgender persons) is that many surgeons have internalised the general stigma and prejudice that exists towards transgenderism".[404]

Thereafter, in the rest of the African states where there are no explicit provisions for transgender women, they are forced to seek hormones on the black-market which put them at risk for infection and/or incorrect administration.[405] Often, a desire for gender affirming procedures will require transgender women to travel outside of the African continent.

5 3 Health and Reproductive Rights in the Maputo Protocol

Article 14 of the Maputo Protocol sets out a duty on all State Parties to ensure, respect and promote the right to health of all African women. Article 14(1) emphasises the inclusion of sexual and reproductive health within this right. This is in line with the international position as expressed in the CESCR's *General Comment No 22* that "the right to sexual and reproductive health is an integral part of the right to health".[406] However, in the same *General Comment,* it was conceded that certain individuals, including transgender women, are often restricted the full enjoyment of the right to sexual and reproductive health because of "multiple and intersecting forms of discrimination that exacerbate [their] exclusion in both law and practice".[407]

As set out under 1 5, reproductive rights are not part of the discussion which ensues in this subsection. To teleologically interpret the relevant provisions of article 14, it is read alongside articles 2, 3, 4 and 5, as well as to the preamble to provide a holistic view of the obligations in which the principles of equality, universality and non-discrimination are enshrined. As argued by Cohen et al, state obligations require that:

> "Governments be proactive in removing systematic barriers that marginalise discrete groups from social benefits, in particular, where those groups are distinguished by personal characteristics such as race, gender and ethnic origin. It is not enough for governments to adopt sound medical and equitable social criteria for treatment eligibility; they must go the extra step of ensuring that people ultimately are able to access treatment on a non-discriminatory basis".[408]

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404 Bateman (2011) *SAMJ* 91, 93.
405 J Arnott & AL Crago *Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia and South Africa* (2009) 50.
406 CESCR 'General Comment No 22' on 'the right to sexual and reproductive health (art 12)' E/C.12/GC/22 para 1.
407 Para 2.
408 J Cohen, N Kass & C Beyrer "Human Rights and Public Health Ethics: Responding to the Global HIV/AIDS pandemic" in C Beyrer & HF Pizer (eds) *Public Health & Human Rights Evidence Based Approaches* (2007) 385.

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Thus, as argued under 2 5 1, as non-discrimination operates on non-exhaustive grounds, the following discussion begins with the supposition that in order for State Parties to fully realise the right to health of all women as protected by the Maputo Protocol, any exclusion on the basis of gender identity is a violation of the object and purpose of the Protocol itself.

5 3 1 The provision of health services

Article 14(2)(a) of the Maputo Protocol sets out the right to access to healthcare and health services and that:

> "States Parties shall take all appropriate measures to: provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas".

As discussed earlier under 5 2 1, access to healthcare is a crucial aspect of the realisation of the right to health and this incorporates the provision of health goods and services, essential drugs as well as access to health facilities.

The African Commission analyses article 14(2)(a) in its *General Comment No 2.*[409] It emphasises that the accessible nature of healthcare must be financial and geographical and that the availability as well as quality of the services must be provided on the basis of non-discrimination.[410] The African Commission argues that State Parties have the obligation to provide services that are "comprehensive, integrated and rights-based".[411] Further, it concludes that these obligations require State Parties to develop their public health plans within their respective states to meet the international standards for health and keep in line with the standards set out in the relevant treaties including the ICCPR, ICESCR and CEDAW. Article 14(2)(a) describes that healthcare must be adequate, affordable and accessible and this echoes the four key elements described by the CESCR as discussed under 5 2 1.[412] These terms read together promote the notion of a progressive and reasonable realisation of the right. This indicates that State Parties are required to fulfil their positive obligations and ensure that their national legislation prioritise the promotion, protection and realisation of the right to health.

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[409] African Commission 'General Comments on art 14(1)(a), (b), (c) and (f) and art 12(2)(a) and (c) of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (28 April – 12 May 2014) 55th Ordinary Session.
[410] Para 29.
[411] Para 53.
[412] Available, accessible, acceptable and of quality.

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A key obstacle to this realisation is the issue of limited resources as mentioned under 5 2 1. In *General Comment No 14* the CESCR concedes that states may have constraints in realising the right to health due to limited resources but that they nonetheless have obligations of immediate effect. What progressive realisation implicates is both meaningful short-term as well long-term obligations. A short-term, or immediate, obligation set out by the CESCR is that the right be exercised on the basis of non-discrimination. The CESCR emphasises that states must take deliberate, concrete and targeted steps towards the full realisation of the right noting that even if the full realisation occurs over a period of time, the goal must still be to achieve the right as "expeditiously and effectively as possible".[413]

In evaluating what 'appropriate measures' looks like in application for African transgender women, the theoretical framework set out in chapters 2 and 3 is useful. As argued throughout this research, transgender women, alongside all other individuals, are beneficiaries of the human rights framework, regardless of their gender identity. Accordingly, they are guaranteed equal provision of their right to health. Moreover, the fulfilment of the principles of universality (namely: universal access), as well as their rights to equality and non-discrimination require healthcare workers to provide equal healthcare services regardless of their gender identity. This must be done in a manner in which their dignity is respected and they are not discriminated against. The 'appropriate measures' of State Parties to provide healthcare which is adequate, affordable and accessible requires two actions. Firstly, for them to ensure that the protection against discrimination is guaranteed to all women on all grounds, including gender identity. Secondly, that they integrate this protection into their respective national healthcare schemes.

As discussed under 5 2 2, many healthcare workers only have a basic education and training which does not provide information regarding individuals with non-normative gender identities and their specific healthcare concerns.[414] Furthermore, as discussed in chapter 4, these service providers may hold certain cultural beliefs and/or convictions which affect their ability to do their work on a non-discriminatory basis. Notwithstanding, *General Comment No 22* sets out that*:*

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[413] CESCR 'General Comment No 14' on 'the right to the highest attainable standard of health (art 12)' 22nd Session (11 August 2000) E/C.12/200/4 para 31.

[414] Müller *Sexual and Reproductive Health for Transgender and Gender Non-Conforming People* (2013) 1.

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> "Unavailability of goods or services due to ideologically based policies or practices, such as the refusal to provide services based on conscience, must not be a barrier to accessing [health] services".[415]

Thus, in order for State Parties to ensure the full realisation of the right to health in line with international standards, there can be no justification for discrimination within and/or refusal of healthcare services on any grounds.

5 3 2 The right to self-protection against HIV/AIDS

As mentioned under 1 5, articles 14(1)(d) and 14(1)(e) are the focus of this discussion as they are crucial in the ensuing analysis of the Maputo Protocol and its approach to HIV/AIDS. As declared by the African Union:

> "[T]he Maputo Protocol remains one of the most progressive and radical human rights instruments relating to the sexual and reproductive health and rights of women. It explicitly recognises women's rights to be protected in the context of HIV".[416]

Accordingly, as it has been stated throughout this thesis that African transgender women are a particularly high-risk minority group for HIV infection. Applying the theoretical framework set out in chapter 2 to incorporate African transgender women into the scope of article 14 can link the "progressive" provisions to them as a vulnerable group. The HIV/AIDS endemic is noted to be one of the major threats to the health of individuals worldwide.[417] On the African continent, this is exacerbated for individuals with non-normative gender identities, including transgender women. It is crucial, therefore, that the interpretation of a human rights instrument such as the Maputo Protocol be implemented as effectively as possible to mitigate this threat, which, as argued throughout this research, is through a purposeful interpretation.

As argued under 5 2 1, HIV/AIDS prevention is an aspect of ensuring the highest attainable standard of health for all individuals and although treatment is crucial in addressing the HIV/AIDS epidemic, it is argued that prevention is equally, if not more, important.[418] As suggested by Cohen et al, a conceptualisation of the highest attainable standard of health as a right undoubtedly includes an obligation to provide

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[415] CESCR 'General Comment No 22' on 'the right to sexual and reproductive health (art 12)' E/C.12/GC/22 para 14.

[416] African Commission *Report: HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses to HIV Study for the African Commission on Human and Peoples' Rights"* (2016) 27.

[417] Cohen et al "Human Rights and Public Health Ethics" in *Public Health & Human Rights Evidence Based Approaches* (2007) 362.

[418] Cohen et al "Human Rights and Public Health Ethics" in *Public Health & Human Rights Evidence Based Approaches* (2007) 374.

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access to the best HIV prevention strategies available.[419] As set out previously - education, prevention and treatment are the key focus areas in order to curb the HIV/AIDS crisis. This is reflected in the Maputo Protocol as article 14(1)(d) specifically sets out that:

> "States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS".

Although article 14(1)(d) refers in general to self-protection against STIs, as stated under 1 5, this subsection specifically focuses on HIV/AIDS to provide analysis on the wide-spread and life-threatening infection.

HIV/AIDS was not always considered a human rights concern. Initially, due to the misconception of how the infection was spread, it was framed as a sexual health issue which affected only certain minority groups, in particular: homosexual men and transgender women.[420] Historically, the high frequency of HIV/AIDS in the queer community was seen as a result of unprotected intercourse where individuals believed condoms were only used to prevent pregnancy. With the spread of the infection amongst the gay community specifically (with many transgender women being subsumed into that category) other individuals believed they could not contract it as it was a "gay" problem and not a risk for them.[421] It was only later correctly framed as a threat to the enjoyment of the fundamental human rights of all individuals.

Although any individual can contract HIV/AIDS, certain groups are more vulnerable to infection and individuals with non-normative gender identities make up a considerable part of this infected population, including transgender women. The relevant literature defines such groups as "key populations". These key populations are described as:

> "[D]efined groups who, due to specific higher-risk behaviours, are at increased risk of HIV irrespective of the epidemic type or local context. Also, they often have legal and social issues related to their behaviours that increase their vulnerability to HIV".[422]

The WHO identifies five main key populations groups, including: men who have sex with men, individuals who inject drugs, individuals who are in in prison, sex workers

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[419] Cohen et al "Human Rights and Public Health Ethics" in *Public Health & Human Rights Evidence Based Approaches* (2007) 381.
[420] 374.
[421] JP De Santis "HIV Infection Risk Factors Among Male-to-Female Transgender Persons: A Review of the Literature" (2009) 20 *Journal of the Association of Nurses in AIDS Care* 367.
[422] WHO *Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations 2016 Update* (2016) xii.

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as well as transgender individuals.[423] The recognition of key populations is crucial to understand the dynamics of HIV transmission as these groups are described as "essential partners" in effective responses to the epidemic. Shisana et al argue that key population groups are at a high risk of contracting HIV because they are individuals who are stigmatised and less likely to be reached by interventions compared to that of other individuals.[424] Factors that have been recorded to exacerbate transgender women's vulnerability to HIV specifically include high-frequency of engaging in sex work, lack of adequate sexual education, lack of tertiary education as well as access to housing and other social services.[425]

The obligation set out in article 14(1)(d) requires State Parties to ensure African women are able to be protected and to self-protect against HIV/AIDS. The point of departure for protective measures against HIV/AIDS are barrier contraceptive methods, specifically condoms (both 'male' and 'female') as they are the most effective preventive tool against the spread of HIV/AIDS. UNAIDS describes them as a "key prevention service"[426] and the WHO includes condoms in its model list of essential medicines.[427] This discussion on condoms as a mechanism of sexual self-protection is neither with regard to the prevention of general STIs nor pregnancy, but is rather in application to transgender women specifically, whether they or their sexual partner use them. The intricacy and diversity of transgender women's bodies makes this discussion complex and accordingly this subsection only focuses on the role of condoms as a key self-protection mechanism against HIV/AIDS. UNAIDS argues that:

> "Condoms are at the centre of a combination HIV prevention approach (…) An estimated 45 million HIV infections have been averted through condom use globally since 1990. Achieving the global condom target for 2020 would avert 3.4 million new infections".[428]

Notwithstanding that condom provision is a crucial aspect of realising the right to sexual health and the right to health overall; with regard to access of condoms, data

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423 WHO *Consolidated Guidelines on HIV Prevention, Diagnosis, Treatment and Care for Key Populations 2016 Update* (2016) xii.

424 O Shisana, N Zungu, M Evans, K Risher, T Rehle & D Celentano "The case for expanding the definition of 'key populations' to include high-risk groups in the general population to improve targeted HIV prevention efforts" (2015) 105 *SAMJ* 664.

425 Müller *Sexual and Reproductive health for Transgender and Gender Non-Conforming People* (2013) 6.

426 African Union *Report: HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses to HIV Study for the African Commission on Human and Peoples' Rights"* (2016) 6.

427 WHO *Model List of Essential Medicines* (2015) 38.

428 African Union (2016) 30.

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in the African region shows inconsistencies in state provision.[429] Of specific concern is the fact that it is often the individuals who don't have access to condoms that are the most susceptible to the risk of contracting HIV/AIDS, which includes individuals with non-normative gender identities such as transgender women, as well as sex workers (who are often an overlapping group as discussed earlier). Sex workers are a key population, their high risk of infection is often as a result of the refusal and/or compulsion from their clients to not use a condom.[430] The WHO notes that the combination of stigma and discrimination they experience pose barriers to them receiving effective HIV/AIDS care.[431] As described by UNAIDS:

> "Sex work (or aspects of sex work) is criminalised in a great majority of countries across Africa. Even in countries where sex work is not criminalised, law enforcement practices such as arbitrary detention and arrests based on condom possession deter sex workers from accessing condoms and place them at risk of HIV infection. Sex workers have also been charged with spreading STIs and forced to undergo mandatory HIV testing".[432]

The prevalence of African transgender women in sex work, as discussed under 3 4 2, is relevant in this context to illustrate the double discrimination they face when attempting to self-protect from HIV/AIDS. Because access to barrier contraceptives are a crucial aspect of essential public healthcare services and ensuring self-protection against transmission, the provision of condoms without stigma or discrimination is decisive in preventing the further spread of HIV/AIDS. Consequently, State Parties should ensure the free distribution of condoms within their public health facilities, alongside the guarantee that all individuals, regardless of their gender identity, will be able to obtain and safely use this key protective measure.

5 3 3 The right to be informed of one's health status

The final consideration for the right to health in article 14 is the provision for women to be informed of their health status. Article 14(1)(e) stipulates that:

> "States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes: the right to be informed of one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices".

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429 African Union (2016) 32.
430 De Santis (2009) *Journal of the Association of Nurses in AIDS Care* 365.
431 WHO (2016) 6.
432 African Union (2016) 11.

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A crucial aspect of realising the right to sexual health, as part of the overall right to health, is the guarantee of mental and physical integrity and autonomy.[433] As set out by the CESCR in *General Comment No 22,* the freedoms as part of this right include the ability of all women to make free and responsible decisions regarding their sexual health.[434] Accordingly, an individual being aware of their HIV status is an integral aspect of making responsible health decisions because the risk of an individual not knowing is that they can easily infect others, which violates the other individual's right to self-protection. There is not yet a cure for HIV/AIDS. Accordingly, the most effective treatment is preventative rather than reactive treatment. However, because HIV/AIDS is a preventable virus, if it is dealt with correctly, its spread can be controlled. Easily accessible and affordable HIV/AIDS testing is a crucial aspect of this. As described by Cohen et al:

> "A core piece of many of these prevention efforts [is] HIV testing. An assumption is that HIV testing, when conducted well, both informs individuals about risks for HIV (whether or not they are infected), allows people who are found to be infected to take special precautions to prevent the further spread of the disease, and serves as a gateway to diagnosis and treatment".[435]

A key reason why many individuals around the world do not know their HIV status is due to misconceptions and stigma held against being infected with HIV/AIDS. UNAIDS noted in a recent study that in the western and central African region, 40 per cent of adults said they wouldn't buy vegetables from a shopkeeper who was HIV positive.[436] As already noted, transgender women are ostracised in society; moreover, if they also have HIV/AIDS, the repercussion of double discrimination is detrimental to the protection of their human rights and ensuring that they are treated with dignity in society.

HIV/AIDS testing is a crucial part of general healthcare services and it is vital that all individuals make use of such services and know their HIV/AIDS status. However, for many individuals, they are too scared to know their status as many do not realise that it is a treatable infection and/or because they fear the consequences of being identified to have the infection.[437] As explained by the WHO and OHCHR, "fear of

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[433] CESCR 'General comment No 22' on 'The right to sexual and reproductive health (art 12)' E/C.12/GC/22 para 10.
[434] Para 25.
[435] Cohen et al "Human Rights and Public Health Ethics" in *Public Health & Human Rights Evidence Based Approaches* 374.
[436] UNAIDS *DATA 2018* (2018) 71.
[437] Cohen et al "Human Rights and Public Health Ethics" in *Public Health & Human Rights Evidence Based Approaches* 380.

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being identified with HIV/AIDS may stop people who suffer discrimination (…) from voluntarily seeking counselling, testing or treatment".[438] In line with the enshrined object and purpose of the Maputo Protocol, protecting the rights of all women requires State Parties to ensure HIV testing is a common, accepted practice that all women have access to as this is a key aspect of ensuring an inclusive right to health; which is an inherent right in order to protect the enjoyment of all interrelated rights. As described by Cohen et al:

> "From a human right perspective, any approach to HIV testing should recognise that people have a right of access to HIV testing as part of the broader right to health care as enshrined in the International Covenant on Economic, Social and Cultural Rights. Considerations such as informed consent, confidentiality of test results, protections against violence and discrimination and measures to combat stigma are not intended to be barriers to HIV testing. On the contrary, they are human rights imperatives".[439]

A teleological interpretation of the Maputo Protocol requires State Parties to fulfil these 'human rights imperatives' during the fulfilment of their obligations. Addressing the HIV/AIDS crisis and protecting the human rights of African transgender women cannot be seen as separate endeavours. Similarly, recognising and protecting African transgender women and fully realising their rights in the Maputo Protocol are not separate tasks, due to the fact that the rights of these women continue to be violated because of a denial of their identities; which is a violation of the object and purpose of the Maputo Protocol to ensure the rights of all women are protected and promoted. In consideration of this, certain illustrations of violations to health rights are discussed below.

5 4 Violations of African transgender women's right to health

Similar to the structure of chapter 4, this final subsection provides an illustration of violations of African transgender women's right to health. As set out under 1 4, this thesis is based on secondary sources only and as such, it is not able to directly account for the lived experiences of all African transgender women. Instead, based on the relevant, available sources, it aims to provide a general discussion of the hurdles that African transgender women are faced with when attempting to access general healthcare, gender affirming services as well as HIV/AIDS preventive services and/or

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438 OHCHR & WHO *The Right to Health Fact sheet 31* (2008) 21.
439 Cohen et al "Human Rights and Public Health Ethics" in *Public Health & Human Rights Evidence Based Approaches* 380.

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treatment. The same approach used under 4 4 is applied in this section in order to assess the utility of the respective rights discussed under 5 3.

5 4 1 Stigma and discrimination within healthcare services

As set out earlier, ensuring available, affordable, acceptable and quality healthcare services is a key aspect of realising the right to health. This is established through article 14(2)(a) of the Maputo Protocol and is echoed throughout conceptualisations of the right to health under international human rights law.[440] As mentioned under 5 2 1, the right to health within this research includes a key focus on access to primary healthcare.

Social and economic exclusion are the two main challenges which create barriers for individuals when attempting to access healthcare. The focus of this subsection is how this social and economic exclusion bars universal access to healthcare which, as a result, particularly disadvantages African transgender women. Throughout this research, causes of stigma and discrimination against African transgender women have been discussed, including: heteronormativity, cultural conservatism, religious persecution, lack of exposure as well as fear. These, in the context of access to healthcare are direct infringements of the underlying notions of universal and equitable access as well as access to healthcare on a non-discriminatory basis. In *General Comment No 22* the CESCR noted that*:*

> "Non-discrimination in the context of the right to sexual and reproductive health also encompasses the right of all persons, including lesbian, gay, bisexual, *transgender* and intersex persons, to be fully respected for their sexual orientation, *gender identity* and intersex status". [emphasis added][441]

As discussed under 2 4, queer legal theory sets out that individuals' human rights are protected by the law regardless of how they present themselves or perform their identities. A binary heteronormative denial of the realisation of human rights is contradictory to the principle of universality. The right to health in combination with the right to dignity, equality and non-discrimination implies that transgender women's right to health should be realised notwithstanding their gender identity.

Furthermore, the WHO and OHCHR argue that the rights to equality and non-discrimination for all individuals indicate that states have to recognise and provide for

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[440] CESCR 'General Comment No 14' on 'The right to the highest attainable standard of health (art 12)' E/C.12/200/4 para 12.
[441] Para 23.

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the different specific needs of groups in the face of particular health challenges.[442] Accordingly, even as individuals may experience many of the same health conditions, certain minorities may experience exacerbated health conditions because of their positioning in society. This is true for African transgender women and their position is exacerbated due to a number of factors including when they are financially insecure, homeless, operating as sex workers and/or without formal employment.[443] The combination of intersectional factors like these make African transgender women more likely to not be able to have their right to health fully realised.[444]

The CESCR sets out that states have an obligation to ensure the elimination of systemic discrimination regarding socio-economic rights. This includes healthcare professionals and providers upholding the principles of equality and non-discrimination.[445] Yet this is not an experience nor guarantee for a majority of African transgender patients. As explained by the OHCHR, "healthcare professionals are often insensitive to the needs of transgender persons and [they] lack the necessary professional training".[446] This affects many transgender women's ability to realise this right compared to the rest of the global population. Thomas et al argues that:

> "[T]ransgender people often experience a disproportionately high burden of disease, including in the domains of mental, sexual and reproductive health. Exposure to violence, victimization, stigma and discrimination are also higher in this population. In addition, they experience barriers to accessing health care and health-determining resources, such as education, employment and housing. These barriers are largely attributable to legal, economic and social deprivation, marginalization, stigmatization and discrimination, including non-recognition of a gender identity that is different from the sex assigned at birth".[447]

Accordingly, the stigma and discrimination which affect transgender women's access to healthcare are violations of their right to health and are noted to exacerbate, as well as cause, ill-health.[448] Thomas et al argue that there are three key challenges to the realisation of the right to health of the transgender population. Firstly, they argue that

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442 OHCHR & WHO *The Right to Health Fact sheet 31* (2008) 7.
443 12.
444 R Thomas, F Pega, R Kholsa, A Verster, T Hana & L Say "Bulletin of the World Health organisation: Ensuring an inclusive health agenda for transgender people" (2-2-2017) *<https://www.who.int /bulletin/volumes/95/2/16-183913/en/>* (accessed 14-04-2019).
445 CESCR 'General Comment No 20' on 'non-discrimination in economic, social and cultural rights (art 2, para 2)' E/C.12/GC/20 para 39.
446 OHCHR *Born Free & Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012) 49.
447 Thomas et al "Bulletin of the World Health organisation: Ensuring an inclusive health agenda for transgender people" (02-02-2017) *<https://www.who.int/bulletin/volumes/95/2/16-183913/en/>* (accessed 14-04-2019).
448 Theilan (2014) *Human Rights Law Review* 331.

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there is a lack of significant data (which relates to the discussion under 1 5 and 4 4 1) which is able to assess and engage with the status of the health of transgender women worldwide. With a focus on the heightened risk of HIV/AIDS, they argue that the poor understanding of the burden of HIV/AIDS amongst transgender women is because of their limited inclusion within national HIV/AIDS monitoring systems.[449] Secondly, they argue that the gap of knowledge regarding transgender specific healthcare is a barrier to their right to access and reinforces them as an invisible social group. They define these two factors as "social and legal drivers of ill-health". Finally, they argue that the underlying mechanisms of social exclusion systematise how healthcare operates worldwide and that these mechanisms are inherently biased and discriminatory against transgender women.[450] Notwithstanding the conceptualisation that all human rights, including the right to health, are bestowed on all individuals on the basis of universality (due to the inherent dignity of all individuals); worldwide, individuals with non-normative gender identities are often denied healthcare services and/or have a negative experience at the hand of health care providers because of stigma and discrimination. This is a constant reality for many African transgender women and affects their trust in healthcare systems and willingness to seek out healthcare services.[451] De Santis argues that:

> "Healthcare is an issue for [transgender women] for a multiple of reasons including verbal abuse, discrimination, insensitivity and a lack of trust in [healthcare providers], lack of knowledge or education on the part of the [healthcare providers] and an overemphasis of HIV infection in the context of transgender healthcare".[452]

In most African states resources to support public healthcare facilities are scarce.[453] Moreover, a lack of exposure to non-normative individuals has been linked to unprofessional and ill-treatment of them.[454] An illustration of this can be seen in

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[449] O Shisana, N Zungu, M Evans, K Risher, T Rehle & D Celetano "The case for expanding the definition of 'key populations' to include high-risk groups in the general population to improve targeted HIV prevention efforts" (2015) 105 *SAMJ* 214.

[450] Thomas et al "Bulletin of the World Health organisation: Ensuring an inclusive health agenda for transgender people" (02-02-2017) *<https://www.who.int//bulletin/volumes/95/2/16-183913/en/>* (accessed 14-04-2019).

[451] Müller *Sexual and Reproductive health for Transgender and Gender Non-Conforming People* (2013) 4.

[452] De Santis (2009) *Journal of the Association of Nurses in AIDS Care* 366.

[453] CB Isselmuiden, TC Nchinda, S Duale, NM Tumwesigye & D Serwadda "Bulletin of the World Health Organisation: Mapping Africa's advanced public health education capacity: the AfriHealth project" (12-10-07) *World Health Organisation <https://www.who.int/bulletin/ volume /85/12/07-045526/en/>* (accessed 14-04-2019).

[454] C Paradiso & RM Lally "Nurse Practitioner Knowledge, Attitudes, and Beliefs When Caring for Transgender People" (2018) 3.1 *Transgender Health* 49.

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occurrences where an individual who comes in for care or a check-up will be initially well-received by the staff, until the staff realise that they are transgender and that their gender expressed does not correlate to their biological sex.[455] In such instances often fear, confusion, personal stigma and/or beliefs implicate their ability to be non-judgmental and professional.[456] As discussed under 5 4 1, unequal and stigmatised treatment of non-normative individuals, such as transgender women, is exacerbated within highly religious or conservative societies. However, in consideration of the fact that the right to health is a key right in the pursuit of a dignified existence; relativist approaches determining who may be regarded as worthy of healthcare services and who is not is an infringement of international human rights law.

5 4 2 Pathologisation of transgender individuals

A key contributing factor to the stigmatisation and discrimination against transgender women stems from their pathologisation which brands them as mentally disordered and/or ill. Pathologisation, as described by Suess et al, is the "psycho-medical, legal and cultural practice of identifying a feature, an individual or a population as intrinsically disordered".[457] Tarver argues that throughout history, individuals have been classified as mentally disordered based on a "socially influenced psychiatric condition" in order to justify poor treatment of them.[458]

Kara submits that the pathologisation of transgender individuals causes several human rights concerns.[459] She begins by highlighting that the restrictive norms from which pathologisation operates is a result of outdated colonial influence which imposes a cisnormative gender binary and which erases the plurality of gender diversity. Furthermore, she submits that the treatment of transgender individuals as mentally ill often becomes a self-fulfilling prophecy and tends to exacerbate their experiences with mental illness. Because transgender individuals have become dependent on a pathologised diagnosis in many states in order to access legal recognition as well as gender affirming services and procedures; this creates a burden

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455 Müller *Sexual and Reproductive health for Transgender and Gender Non-Conforming* People (2013) 4.
456 Paradiso & Lally (2018) *Transgender Health* 52.
457 A Suess, K Espineria & P Crego Walters, as quoted in Kara *Gender is not an illness* (2017) 4.
458 DE Tarver "Transgender Mental Health: The intersection of race, sexual orientation, and gender identity" in BE Jones & MJ Hill (eds) *Mental Health Issues in Lesbian, Gay, Bisexual, and Transgender Communities* (2002) 94.
459 Kara *Gender is not an illness* (2017) 6.

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on them to accept a diagnosis of being mentally ill in order to access basic socio-economic services. Kara further argues that:

> "[A]busive practices and policies that are justified by these medical classifications, such as so-called corrective or reparative therapies, and forced or coerced sterilization and surgeries, including as pre-requisites to legal gender recognition, have been recognised as tantamount to torture, or cruel, inhuman or degrading treatment by [the] United Nations and regional human rights mechanisms".[460]

The International Classification of Diseases and Related Health Problems ("ICD") acts as the manual for the classification of health conditions worldwide. The ICD is sponsored by the UN and published by the WHO to provide an organising system for health conditions, diseases, as well as potential related signs and symptoms. Ghebreyesus argues that the ICD enables society to better understand causes of illness and death and provides tools to prevent suffering and save individuals' lives.[461]

Moreover, the Diagnostic and Statistical Manual of Mental Disorders ("DSM") is published by the American Psychiatric Association to offer common language and standardised criteria for the classification of mental disorders. Although American, it is relevant to this research due to its influence on the mental health industry worldwide.[462] Both the DSM and ICD have in different ways and through different terminology, pathologised transgender individuals. The DSM III in 1980 first included the diagnosis of "Transsexualism".[463] Thereafter, the DSM IV, in 1994, included "Gender Identity Disorder in Adolescents and Adults" as a replacement for the transsexualism diagnosis. Trans-feminists criticise the fact that gender identity disorder was added to the DSM III when homosexuality was removed. They stipulate that this addition was an attempt by the international community to continue to police atypical gender expressions.[464] Most recently, in the DSM V, the condition of gender identity disorder in adolescents and adults was removed and replaced with "Gender Dysphoria".[465] Gender dysphoria is described as the distress individuals experience due to the incongruence between their sex and gender. The term 'gender dysphoria' emphasises the state of distress because of the incongruence.

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460 Kara *Gender is not an illness* (2017) 7.
461 C Lindmeier "WHO releases new International Classification of Diseases (ICD 11)" (18-06-2018) *World Health Organisation* <https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-(icd-11)> (accessed 10-04-2019).
462 SL Sennott "Gender Disorder as Gender Oppression: A Transfeminist Approach to Rethinking the Pathologisation of Gender Non-Conformity" (2011) 34 *Women & Therapy* 94.
463 Sennott (2011) *Women & Therapy* 95.
464 95.
465 American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 5 ed (2013) 451.

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Comparatively, the ICD 10 in 1994, moved "Transsexualism" from the "Mental Disorders" under "Neurotic Disorders, Personality Disorders and Other Nonpsychotic Mental Disorders" within "Sexual Deviations and Disorders" to a specific section created entitled "Gender Identity Disorders" under the chapter titled "Mental and Behavioural Disorders". The most recent version of the ICD, the ICD 11, was completed in 2018. It is planned to come into effect on 1 January 2022 and to thereafter be implemented internationally.[466] The ICD 11 is noteworthy as it has removed the disorder of "Transsexualism" and replaced it with "Gender Incongruence", defined as "a marked and persistent incongruence between an individual's experienced gender and the assigned sex".[467] Notably, this diagnosis has no presence of distress nor impairment, and instead provides only an acknowledgement of the divergence between an individual's sex and gender. Another significant change within the ICD 11 is the abolishment of the section of "Gender Identity Disorders" and the fact that "Gender Incongruence" is not situated within "Mental and Behavioural Disorders" but rather in the chapter titled "Conditions Related to Sexual Health". [468] The WHO argues that this was because:

> "[E]vidence is now clear that [being transgender] is not a mental disorder, and indeed classifying it in this can cause enormous stigma for people who are transgender, there remain significant health care needs that can best be met if the condition is coded under the ICD".[469]

The ICD 11 diagnosis is praised to better encapsulate the experiences of being transgender with focus on the experience of having a non-normative gender identify rather than implying that this non-normativity is an indicator of mental illness. Queer legal theory is illuminating in this regard to expose that pathologisation enforces a heteronormative lens punishing individuals for not complying with the gender binary. De-pathologisation is crucial because, as noted earlier under 4 3 2, there is a clear link between branding transgender people as ill and transphobic violence.

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[466] C Lindmeier "WHO releases new International Classification of Diseases (ICD 11)" *World Health Organisation* (18-06-201) <https://www.who.int/news-room/detail/18-06-2018-who-releases-new-international-classification-of-diseases-(icd-11)> (accessed 10-04-2019).

[467] World Health Organisation *International Classification of Diseases and Related Health Problems* 11 ed (2018); see <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/411470068> (accessed 10-07-2019).

[468] Kara *Gender is not an illness* (2017) 5-6.

[469] T Fitzsimons "'Transsexualism' removed from World Health Organisation's disease manual" *NBC News* (20-06-2018) <https://www.nbcnews.com/feature/nbc-out/transsexualism-removed-world-health-organization-s-disease-manual-n885141> (accessed 12-04-2019).

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On the 17th of May 2016 several UN Committees, regional Commissions including the African Commission, as well as international human rights experts published a statement calling for an end to pathologisation entitled: "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness".[470] This joint statement reflects a shift in the international community where individuals are unequivocally protected and regarded as equal legal subjects regardless of their gender identities. This statement can be seen as an embodiment of queer legal theory, where biases in the law (such as binary gender categorisation) are identified as harmful and called to be erased. The CESCR noted in a Concluding Observation on Germany that regarding transgender individuals as mentally ill because of their gender identities leads to discrimination which violates their health rights.[471]

Theilan argues that there is a right to de-pathologisation.[472] She continues that this is in light of a holistic and interrelated realisation of the right to health, equality as well as non-discrimination.[473] As stated:

> "Due to the detrimental effects of pathologisation on trans persons' well-being, the right to health is implicated and may be violated in any number of scenarios (…) the fact that only transsexual and transgender persons are pathologised, but not the large majority of cisgender persons, constitutes unequal treatment. If no justification for such treatment can be found – as indeed it cannot – the right to non-discrimination is likewise violated".[474]

Moreover, Theilan argues that the fundamental notions of human dignity and personal autonomy within international human rights law (as the basis of the right to gender recognition) cannot be reconciled with the pathologisation of transgender individuals.[475] Accordingly, the promotion of the right to gender recognition as an inherent aspect of the right to dignity as discussed under 3 2 2 coincides with the right to de-pathologisation as an inherent aspect of the right to health. In light of the main research aim, de-pathologisation within the African human rights system would both confirm the inherent dignity and equality of African transgender women within the

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470 OHCHR "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness" For International Day against Homophobia, Transphobia and Biphobia – Tuesday 17 May 2016" *OHCHR* 27-05-2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956&LangID=E> (accessed 02-03-2019).

471 CESCR 'Concluding Observations on the fifth report of Germany on the implementation of the ICESCR' (20 May 2011) E/C.12/DEU/CO/5 para 26 as quoted in Theilan (2014) *Human Rights Law Review* 330.

472 Theilan (2014) *Human Rights Law Review* 330.

473 342.

474 332.

475 332.

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protective scope of the Maputo Protocol as well as contribute to a fulfilment of the obligations set out in articles 3(1), 3(2) and 14(2)(a).

5 4 3 Vulnerability to HIV/AIDS

The spread of HIV/AIDS worldwide is a pandemic and has been noted as the "most important infectious disease threat to human health of our time".[476] Moreover, the African continent is the "epicentre" of this HIV/AIDS pandemic.[477] In 2018, UNAIDS stated that 53 per cent of individuals who have HIV/AIDS live on the African continent and that the majority of HIV/AIDS infections are found in the sub-Saharan African region specifically.[478] UNAIDS has further estimated that 19 per cent of transgender women worldwide have HIV/AIDS and that they are 49 times more likely to acquire HIV/AIDS than any other individuals of reproductive age.[479] Thus, for African transgender women, the intersection of geography and status as a minority with non-normative gender identities defines their risk of infection as an urgent human rights concern. Beyrer argues that:

> While LGBT rights issues include many social concerns in their own rights, they have also been prominent areas of effort and contention in the era of HIV. This is true everywhere the pandemic has affected communities and countries, but perhaps most especially so in Africa, the hardest hit region of the world by HIV/AIDS".[480]

It has been noted throughout this thesis that African transgender women are a key population group vulnerable to HIV/AIDS infection.[481] This is often attributed to the high frequency of African transgender women occupied as sex workers, to risky sexual behaviour as well as to a lack of education and information regarding the virus, which is often a consequence of social and economic marginalisation. Moreover, another key risk factor is the sharing of needles between individuals during the administering of hormones.[482] Furthermore, the social stigma related to being HIV positive as well

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476 Cohen et al "Human Rights and Public Health Ethics" in *Public Health & Human Rights Evidence Based Approaches* (2007) 362.
477 African Union *Report HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses to HIV* (2016) 13.
478 UNAIDS (2018) 5.
479 UNAIDS *The Gap Report 2014: Transgender People* (2014) 3.
480 C Beyrer "LGBT Africa: A social justice movement emerges in the era of HIV" (2012) 9 *SAHARJ* 177.
481 JM Fogel, T Sandfort, Y Zhang, X Guo, W Clarke, A Breaud, V Cummings, EL Hamilton, A Ogendo, N Kayange, R Panchia, K Dominguez, YQ Chen & SH Eshleman "Accuracy of Self-Reported HIV Status Among African Men and Transgender Women Who Have Sex with Men Who were Screened for Participation in a Research Study: HPTN 075" (2018) *AIDS and Behavior* 2.
482 Müller *Sexual and Reproductive health for Transgender and Gender Non-Conforming People* (2013) 10.

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as the discrimination experienced by transgender women during attempting access to healthcare services often discourages them to get tested and actively know their status. This puts them, their partners and their families at risk. Sibidé argues that:

> "Stigma and discrimination still [have] terrible consequences. The very people who are meant to be protecting, supporting and healing people living with HIV often discriminate against the people who should be in their care, denying access to critical HIV services, resulting in more HIV infections and more deaths. It is the responsibility of the state to protect everyone. Human rights are universal—no one is excluded, not sex workers, gay men and other men who have sex with men, people who inject drugs, transgender people, prisoners or migrants. Bad laws that criminalize HIV transmission, sex work, personal drug use and sexual orientation or hinder access to services must go, and go now".[483]

Because African transgender women are identifiable as a key population, a teleological interpretation of the Maputo Protocol shows that the exclusion of them from the protective scope of the Protocol is a violation of their rights to dignity, health and life as set out in the Protocol. This violation is in consideration of the object and purpose of the Maputo Protocol. Moreover, as the discrimination which occurs against these women is a reaction to their non-normative gender identities and informed by culturally relativist, heteronormative perspectives; it is contrary to the object and purpose of the Maputo Protocol. Accordingly, African transgender women's high likelihood of contracting HIV/AIDS and not being correctly treated thereafter because they are transgender is an arbitrary and life-threatening consequence, contrary to the values and objects of the Maputo Protocol and therefore a violation of the obligations contained in article 14(2)(d).

5 5 Conclusion

The right to health, as contained in article 14 of the Maputo Protocol, affects the ability of individuals to fully enjoy and realise all of their other human rights. Excluding African transgender women from this provision (particularly through barriers of access to healthcare) on the basis of stigma and discrimination is a violation of international human rights law in general as well as the Maputo Protocol specifically. In this chapter, a teleological interpretation of articles 14(2)(a), 14(1)(d) and 14(1)(e) illustrated that access to primary healthcare for African transgender women should include gender affirming services and procedures as well as HIV/AIDS preventative services and treatment. Thus withholding any related services, procedures and/or treatments, as is the case in most State Parties, is a violation of international human rights law.

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483 UNAIDS *DATA 2018* (2018) 2-3.

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Moreover, the pathologisation of African transgender women impairs their ability to realise their rights as set out in the Maputo Protocol, including their rights to dignity and health. A full realisation of the right to health, through a teleological interpretation which ensures that women are able to “fully enjoy all their human rights” as set out in the preamble, requires State Parties to de-pathologise them and to integrate them into their national health schemes, ensuring that they receive access to adequate primary healthcare services, including gender affirming procedures and treatment.

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CHAPTER 6

CONCLUSION

6 1 Introduction

This thesis set out to assess whether African transgender women are recognised and protected through a teleological interpretation of the Maputo Protocol. This assessment was undertaken in consideration of a few factors; firstly, that the definition provided for 'women' in article 1(k) of the Maputo Protocol defines them as persons of female gender and transgender women, as argued in this research, are of female gender because of their gender identities. Secondly, as the object and purpose of the Maputo Protocol is to "ensure that the rights of women are promoted, realised and protected" and because transgender women are women, this thesis undertook to identify the causes and consequences of their unlawful exclusion from the protective scope of the Maputo Protocol. Thirdly, because the Maputo Protocol is a human rights treaty, the principle of universality and rights to equality and non-discrimination are enshrined within it. Thus, it was supposed that any discriminatory exclusion of African transgender women on the basis of their gender identities is a violation of the Maputo Protocol as well as the fundamental principles of international human rights law.

6 2 Findings

The key to the conceptualisation of individual human rights protection is the acknowledgment of the inherent dignity and equality of all individuals. This confirms the notion that all individuals are born 'free and equal' and are guaranteed the realisation and protection of all of their fundamental human rights, because they are human. This is enshrined in all treaties under purview, such as the UDHR, ICCPR, ICESCR, CEDAW, African Charter and Maputo Protocol. Moreover, the rights to equality and non-discrimination indicate that this acknowledgement, realisation and protection is ensured notwithstanding any personal characteristics present in any individuals, including their gender identity.

The principle of universality together with the rights to equality and non-discrimination in this way establish the foundation of how international human rights law interacts with individuals. Therefore, international human rights law envisions that all human rights, including the rights to dignity, life, integrity, security and health, are inalienable and bestowed on all individuals. As set out under 3 2 1, a key concern

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regarding the enjoyment of human rights is the acknowledgement of an individual's inherent humanity, dignity, 'personhood' as well as identity. Notwithstanding the conceptualisation of human rights, this thesis has shown that within many African states, there is a disregard for the inherent dignity and legal personality of African transgender women. This consequently positions them as legally and socially invisible.

Accordingly, under 2 2, it was confirmed that there is no essential nor universal experience of being a woman; and accordingly that transgender women *are* women on the basis of their gender identity. The narrative where biological reproductive abilities define women are long-outdated. Moreover, in order to establish an individual's gender, it was shown that gender identity, rather than biological sex, is decisive. This is because gender is inherently psycho-social and a manner in which individuals self-identify within society. Under 2 3 post-modern intersectional feminist legal theory was applied which affirmed this. It was shown that intersectionality and post-modernism aid women to transcend previous harmful and discriminatory feminist mechanisms so to better advocate for all women and their multitude of experiences, including different forms of discrimination faced. Moreover, as argued by Banda, intersectionality is particularly useful in the African context to inform states on how to better protect African women, due to the multiple discriminations they face. Colonialism introduced gender essentialism as well as social and legal bias regarding the value and function of women into Africa. Mikell argued that in acknowledgement of this, a 'social reimagination' is required for African women. Thus, it was presented that such a reimagination offers an opportunity for the implementation of theories such as 'transfeminism' as a mechanism for African transgender to incorporate themselves into the theory.

The discussion on queer legal theory, under 2 4, advocated for unequivocal legal recognition and protection of all individuals regardless of their gender identity. Arguments such as Currah's advocacy of gender pluralism were shown to inherently embody the principles of universality, equality and non-discrimination. Furthermore, queer legal theory helped to delineate transgender women and homosexual men, which is important when considering the 'homophobia' (as described by Mukasa) that many transgender women in Africa experience. Therefore, the operation of queer legal theory was shown to be an inherent tool of decolonisation to liberate African individuals, including transgender women, from harmful heteronormative legal limitations. This again was shown to be an embodiment and confirmation of the

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fundamental principles of universality, equality and non-discrimination. Accordingly, post-modern intersectional feminist legal theory and queer legal theory read together presented that a binary and heteronormative perception of gender identity required for legal recognition and protection is contrary to universal human rights protection. Moreover, it is the consequence of outdated, narrow, heteronormative, religious and/or culturally relativist interpretations of the law which continue to exclude transgender women from unequivocal legal recognition and protection. This was shown to be inherently discriminatory. It was furthermore illustrated that the fluidity of identities need to be considered for comprehensive human rights protection, especially as violations are often as a result of discrimination and violence against these women because of their non-normative gender identities.

The principle of universality was discussed under 2 5 1 and it defined as an universally accepted notion that human rights are bestowed onto all humans because they are human. In consideration of this, together with the inherent rights to equality and non-discrimination, it was established that gender identity cannot justify discrimination nor the denial of human rights protection. Furthermore, an inclusive interpretation of 'other status' presented another manner in which gender identity could alternatively be read in as a ground of non-discrimination. Because the understanding of 'universality' has developed since the historically narrow protection of 'man', further developments away from normative and binary understandings of individuals, such as transgender women, were presented as essential when ensuring that the rights to equality and non-discrimination are fully and universally enforced.

In order to assess the justifications presented against protecting non-normative individuals, relativism was discussed under 2 5 2. In light of the fundamental principles and purpose of international human rights law, it was established that relativism is fundamentally flawed. Moreover, it was shown that the international community's values vis-à-via SOGI rights are changing to become more inclusive and universal. This was reflected through the implementation of the mandate for Human Rights Council's Resolution 32/2 and its recent renewal.[484] It was noteworthy that during the

[484] HRC 'Protection against violence and discrimination based on sexual orientation and gender identity' 33rd session (15 July 2016) A/HRC/RES/32/2; HRC 'Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 41st session (10 July 2019) A/HRC/41/L.10/Rev/1.

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second vote, more states voted 'yes' to the resolution than previously and less states voted 'no'.[485]

Under 2 6, the operation and interpretation of treaties were shown to be a key feature in ensuring consistent human rights protection within the international community. Even though this research did not focus on the domestication process of the Maputo Protocol, because international treaties supersede conflicting national law in most domestic systems, their effective interpretation was shown to be crucial in guiding states in their obligations to create domestic law. The teleological approach to treaty interpretation was shown to most effectively provide an interpretation of a human rights instrument that best fulfils its object and purpose. Accordingly, a teleological interpretation of the Maputo Protocol, protecting the human rights of African women, established that an exclusion of transgender women (based on their non-normative gender identities) is discriminatory as the Protocol is founded on the prohibition of discrimination as well as ensuring the rights of African women are provided for and protected. Therefore, it was concluded that it is only through viewing the Maputo Protocol through a culturally relativist and heteronormative lens that transgender women are excluded from its protective scope.

Thereafter, under 3 2 1, human dignity was recognised as a key guiding value as well as substantive right within international human rights law. It was illustrated to be bestowed to all individuals because they are human. However, it was simultaneously acknowledged that notwithstanding its value, it is not defined in any human rights instrument. Accordingly, aspects of violations were rather identified to show that when violated, the inherent dignity and humanity of individuals (their 'personhood') is stripped. This identification was done so to inform the positive state obligations required for adequate human rights protection for marginalised and vulnerable individuals such as African transgender women.

Under 3 2 2 it was established that it is only transgender individuals who are denied their gender recognition and that the consequences of this include a denial of legal recognition and social visibility. This furthermore affects their ability to access basic socio-economic rights, be recognised as legal subjects as well as have adequate recourse when their rights have been violated. Moreover, this denial of gender

[485] HRC 'Mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity' 41st session (10 July 2019) A/HRC/41/L.10/Rev/1. Adopted by a recorded vote of 27 to 12 with 7 abstentions.

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recognition was shown to be a result of the denial of their inherent dignity, which further impacts their ability to have other human rights protected.

Under 3 3 1, the ideological struggle on the African continent was illustrated to explain the continuous conflation between the terms 'sex' and 'gender'. Heteronormative cultural relativism embodied within the legal cultures of many State Parties to the Maputo Protocol was identified as a key contributor to this. Under 3 4 1, the undignified experiences of African transgender women were illustrated to contrast the protections set out within international and African regional human rights law, to their lived experiences.

Because the African human rights system operates to ensure the full enforcement of the principles and rights enshrined within international human rights law, African Commission Resolution 275 was used as an example to reveal the growing awareness and condemnation of violence and persecution against African individuals on the basis of their SOGI. The renewal of the mandate for the UN Independent Expert on SOGI, as discussed under 2 5 2, was again shown as a confirmation of the growing acceptance for recognising and protecting SOGI rights worldwide; as illustrated in the increase of states who voted 'yes' (from 23 to 27)[486] and a decrease in the states who voted 'no' (from 18 to 12).[487] Moreover, the Ghanaian representative in their statement referred to Resolution 275 and noted the "evolution of thinking".

The essential right to life, was discussed under 4 1 to show how when it is violated there can be no enjoyment of any other human rights. Under 4 2 it was emphasised how the rights life, integrity, security, dignity, equality and non-discrimination are all intrinsically linked. This was an important consideration due to the multitude of violations against the human rights of African transgender women and the implications for their other human rights. Due to the fact that the right to life is a *jus cogens* norm, the due diligence, as well as positive State Party obligations to protect all individuals' right, was highlighted and contrasted with the persecution of African transgender women. Moreover, in interpreting the right to life, it was illustrated that a narrow

[486] The states that voted 'yes' for the renewal are: Argentina, Australia, Austria, Bahamas, Brazil, Bulgaria, Chile, Croatia, Cuba, Czech Republic, Denmark, Fiji, Iceland, Italy, Japan, Mexico, Nepal, Peru, Philippines, Rwanda, Slovakia, South Africa, Spain, Tunisia, Ukraine, United Kingdom and Uruguay. As noted, Rwanda and South Africa are the only State Parties to the Maputo Protocol who voted for the renewal.

[487] The states that voted 'no' for the renewal are: Afghanistan, Bahrain, Bangladesh, China, Egypt, Eritrea, Iraq, Nigeria, Pakistan, Qatar, Saudi Arabia, and Somalia. It is noteworthy that Eritrea, Nigeria and Somalia are all State Parties to the Maputo Protocol.

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consideration is inadequate to fully encompass and protect the right and that the avoidance of death is an insufficient realisation.

The teleological interpretation of the rights to dignity, life, integrity and security were shown to provide a wide mandate to protect all individuals from poverty, abuse and violence as well as their bodily autonomy, economic rights, social and health rights. In this sense it was revealed that violations are linked and that so long as the gender recognition and identities of African transgender women are denied; their ability to realise their right to dignity and life, as well as several other human rights, will be threatened. Interrelated to this is the consequence that many African transgender women are frequently victim of human rights abuses without any effective legal recourse. Accordingly, a teleological interpretation of article 4(1) confirmed the simultaneous obligation to promote and protect many other rights set out in the Maputo Protocol.

During the discussion on gender-based violence, both the status of being a woman and being transgender was pinpointed as overlapping causes of violence. This displayed how gender-based violence against African transgender women, which is explicitly prohibited under the Maputo Protocol, puts them at a state of intersectional vulnerability. Moreover, the lack of data on African transgender women and violations against them was presented as an impediment to efficient human rights protection and prevention against violations. It also illustrated the continuation of negation; which denies their existence and subsequently continues the cycle of violations to go undocumented. The issue of conflating transgender women and homosexual men was again acknowledged as a contributing factor to discrimination and violence. Thus, it was shown that if gender recognition is provided, their existence acknowledged and violations against them properly documented; State Parties would be able to adequately address said violations as well as establish mechanisms so to prevent further occurrences.

Under 4 4 2, the practical tension between universality and relativism was illustrated to address the need for specific legal protection of African transgender women and their rights notwithstanding harmful cultural and traditional beliefs and/or practices. Although it is imperative that State Parties retain their positive cultural and traditional beliefs and practices, they cannot be used as justifications for human rights violations. Finally, 4 4 3 presented that the continuous deprivation of dignified existences for African transgender women is a violation of their right to life and a failure of State

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Partie's obligations in this regard. This was shown to be exacerbated for transgender sex workers, who are a considerable part of the transgender African population and often transgender women.

The discussion on the right to health showed that the realisation of the right to health also affects the ability of individuals to enjoy their other human rights. 5 2 1 illustrated that the right to health is not equivalent to a guarantee to be healthy but rather a conceptualisation to achieve the highest attainable standard of health for all individuals. For transgender women specifically, it was established that this includes the provision of gender affirming hormones and treatment as well as confirmation of gender recognition as a key aspect of realising the right to dignity. Notwithstanding this, stigma, discrimination, economic and social exclusion were identified as constant barriers for African transgender women. These were shown to be perpetuated by a lack of adequate information and funds as well as willing and trained healthcare professionals. As South Africa is the only State Party with legislation to facilitate gender recognition and procedures on the continent so far, the experiences in the state were briefly assessed. Through this assessment, however, it was conceded that provision is limited and issues of accessibility and affordability continue.

Cohen's emphasis on removing systematic barriers, as set out under 5 3 3, informed the effects of harmful heteronormativity within the provision of socio-economic services in State Parties. This confirmed how the right to health cannot be realised as long as discrimination against individuals with non-normative gender identities persists. Furthermore, notwithstanding the acknowledged issue of available resources within states in order to fully realise this right, it was shown that State Parties unequivocally have a responsibility to focus on their short-term obligations of immediate effect. This includes ensuring access to healthcare on a non-discriminatory basis to all individuals. Linked to this, it was shown that the "appropriate measures" required of State Parties as per their obligations in the Maputo Protocol requires explicit protection of all individuals, including those with non-normative gender identities, as well as an integration of this into their national legislation.

Because African transgender women are a key population group vulnerable to HIV/AIDS infections, it was found that preventive mechanisms are a priority in terms of ensuring the highest attainable standard for their right to health. Under 5 3 3, it was illustrated that HIV testing and knowing their status is equally important and that a contributing factor as to why many individuals are unaware is due to the stigma

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attached to having HIV/AIDS. Therefore, due to the discrimination African transgender women already experience because of their non-normative gender identities, it was noted that they will experience heightened vulnerability if they also contract HIV. Accordingly, adequate testing and prevention was shown to be not just a health concern, but rather a human rights imperative.

Three key challenges, as argued by Thomas et al, were highlighted to be decisive for the realisation and protection of African transgender women's rights to health. Namely, the lack of data, as similarly discussed in chapter 4, the continuous invisibility and negation of African transgender women and their specific health concerns as well as the perpetuated underlying mechanisms of social exclusion within healthcare systems. Moreover, these systems were argued to be inherently biased and discriminatory against them. Under 5 4 2 pathologisation was highlighted as a key factor of stigma and discrimination against African transgender women. It was shown to be an import of harmful heteronormative colonial beliefs and to exacerbate the ill health of transgender women as well as to impose a barrier for them in order to access basic socio-economic services. Whilst the ICD and DSM were shown to have been contributors to this pathologisation, the current ICD 11 revealed a positive change in how the diagnosis is dealt with in the international community, as gender incongruence is now listed as a sexual condition rather than a mental one. This emphasised that the divergence between gender identity and biological sex within individuals without proposing that that automatically indicates an illness. Moreover, statements from WHO advocating that being transgender is not a mental disorder, infer a positive shift in the way the international community is evolving to view transgender women. As argued by Theilan, there is a right to de-pathologisation to ensure a full realisation of the rights to health, dignity, equality as well as non-discrimination for transgender individuals.

Overall, the violations against the rights to dignity, life, integrity, security and health of African transgender women, illustrated in this research, highlight the impact of harmful traditional and cultural beliefs and practices which continue to directly threaten their dignity and lives. Moreover, their continuous pathologisation (which fundamentally ignores their identities and gender recognition) impairs their ability to access healthcare without stigma or discrimination. The significance of articles 2, 3, 4, 5 and 14 of the Maputo Protocol show how the progressive mandate of the Maputo Protocol is under-utilised in protecting African transgender women in light of their

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specific socio-economic challenges, vulnerability to violence, marginalisation and exposure to HIV/AIDS. Moreover, because African transgender women are human beings, they are entitled to the realisation and protection of their fundamental human rights. Accordingly, any violations of their rights on the basis of their non-normative gender identities is argued to be in direct contravention of the Maputo Protocol.

6 3 Recommendations

In light of these findings, it is recommended that the State Parties to the Maputo Protocol fulfil their obligation contained in article 26 of the Maputo Protocol and submit reports to the African Commission regarding their progress with regard to a full realisation of the respective articles and the effective fulfilment of their state obligations. In consideration of a full realisation of article 3, State Parties should fulfil their obligations as contained in articles 3(3) and 3(4) and 1(j) taking note of the particular vulnerable position of African transgender women. These articles read together with article 2(2) could include interaction with the African Commission to ensure the creation and adoption of a *General Comment* which explicitly recognises transgender women as per article 1(k) and accordingly denounces the harmful heteronormativity which continues to generate and justify violence, degradation and discrimination against these women. This is important because such violence, degradation and discrimination continuously threatens their dignity and ability to fully realise their right to life. In light of this, State Parties should be encouraged in line with articles 3(1) and 3(2) to adopt legislation which ensures gender recognition for transgender individuals within their respective states.

Furthermore, as suggested by Holtmaat and Post, it is reiterated and recommended that the CEDAW Committee create a General Recommendation on article 5(a) of CEDAW which focuses on the relationship between gender stereotypes, traditional gender roles and the oppression of non-normative individuals. Because of the similar content of article 5(a) and article 2(2) of the Maputo Protocol, this Recommendation could be instructive for the State Parties and African Commission.

In consideration of the State Party obligations contained in article 4, State Parties should work together with the African Commission to update *General Comment No 3* and develop the protections afforded by specifically guarding against discrimination and/or deprivation of the right to life on the basis of gender identity and acknowledging the due diligence they have in light of the particular risk transgender women live with.

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Within *General Comment No 3,* whilst the death penalty is condemned, the specific threat against African transgender women (on the basis of their non-normativity, conflation with homosexual men and vulnerability under Sharia law) should be highlighted.

State Parties should implement national measures in line with their obligations contained in articles 3(3), 3(4), 4(2)(c), 4(2)(d) and 5 to guard against violence committed against African transgender women, acknowledging the specific causes and justifications as presented within this research. Engagement with theories such as queer legal theory and post-modern intersectional legal feminist theory as well as first-hand accounts from grass-roots organisations would enlighten the State Parties to the main causes and consequences of violence continuously perpetuated against African transgender women. Thereafter, State Parties would be able to implement appropriate measures nationally to prevent and eliminate the violence as well as to eradicate the harmful beliefs which cause the violations to continue. This could include the introduction of protective legislation ensuring the principles of universality, equality and non-discrimination to protect all individuals regardless of their gender identities.

Thereafter, in consideration of Resolution 275, the CCPR's *General Comment 35,* the CEDAW Committee's General Recommendation No 35 as well as both reports published by the HRC on the findings of the Independent Expert on SOGI; State Parties should, together with the African Commission, create a *General Comment* acknowledging and denouncing harmful cultural and traditional beliefs and/or practices which threaten the human rights of non-normative individuals such as African transgender women. This should call to erase the harmful aspects which invalidate the values of international human rights law as well as the object and purpose of the Maputo Protocol which they are bound to. In this they could also confirm their due diligence to ensure that all state actors furthermore comply and embody these values in their occupations. The decriminalisation of non-normativity, including homosexuality, is also a crucial step, due to the detrimental consequences criminalisation has on the human rights, and lives, of both African homosexual men and transgender women.

Moreover, in order to aid their ability to fulfil the obligations contained in article 4, State Parties should implement systems to collect and monitor data specifically regarding violence and violations against African transgender women. For statistical accuracy, this would require State Parties to firstly recognise the gender identities of

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African transgender women, and secondly to distinguish them from homosexual men. This would also require public assurance that such data would not be used to persecute or prosecute any individuals based on their gender identities.

In consideration of article 14, State Parties should develop national legislation to include and confirm transgender women's ability to access gender recognition and gender affirming hormones and procedures in line with the obligations contained in articles 3(2) and 14(1). This includes an active effort to remove systematic barriers which hinder their access to healthcare, including providing sensitivity training to healthcare providers. Whilst it is acknowledged that lack of resources can impair State Partie's ability to fully realise the right to healthcare, State Parties must nonetheless be urged to focus on their short-term obligations, which are described to be immediately achievable, namely ensuring access to healthcare on a non-discriminatory basis as per article 14(2)(a). Furthermore, the African Commission's *General Comment No 2* should be updated to explicitly condemn discrimination against transgender women and should include gender identity as a ground for non-discrimination.

Furthermore, in light of the specific vulnerability of HIV infection, State Parties must acknowledge and include African transgender women as key populations in their respective national HIV/AIDS prevention and treatment plans. They need to implement mechanisms to ensure the provision and education regarding condoms as a key prevention service. Moreover, it is suggested that the decriminalisation of consensual adult sex work would improve the ability of key population groups to prevent the transmission of HIV/AIDS. Finally, State Parties should implement national legislation to de-pathologise transgender individuals; this could be a part of the legislation as recommended above which would provide for legal gender recognition.

In light of these recommendations; the African Commission should seek specific state reports in light of the particular position of African transgender women under the auspices of the Maputo Protocol and keep the State Parties accountable to their obligations.

In order to fully achieve the object and purpose of the Maputo Protocol and maximise its potential to protect all African women, it is submitted that the State Parties to the Maputo Protocol need to explicitly recognise transgender women as women as set out in article 1(k).

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